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PRINCIPLES
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THE VARIOUS OFFENCES PUNISHABLE BY THE ENGLISH LAW,
THE LAW OF CRIMINAL PROCEDURE,
AND THE LAW OF SUMMARY CONVICTIONS.

WITH
TABLE OF OFFENCES, THEIR PUNISHMENTS AND STATUTES :
TABLES OF CASES, STATUTES, &c.

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BELL YARD, TEMPLE BAR.
1884.



TO
WILLIAM BARBER, ESQ., Q.C.,
PRESIDENT OF THE
JURISPRUDENCE DEPARTMENT, SOCIAL SCIENCE CONGRESS, 1883;
PROFESSOR OF
REAL AND PERSONAL PROPERTY AT THE INNS OF COURT,
WHOSE INTEREST
IN THE EXPOSITION OF THE LAW
IS NOT CONFINED TO ANY ONE SECTION OF LEGAL SCIENCE.

PREFACE TO THE FIRST EDITION.

THE appearance of a new work on the Criminal Law may demand a few words of explanation. Many treatises dealing with this subject are already in existence. Why another? A mere enumeration of the modern standard authors will disclose the want of a manual which neither confines itself to the historical and philosophical view of the matter, nor descends into the minute particulars of the practice of the law. To mention those that are best known:—"Russell on Crimes" is contained in three bulky volumes, and has little concern with criminal procedure. Archbold's and Roscoe's Criminal Practice, entering into every detail, are designed for the reference of the practitioner, when points actually present themselves. The modern commentaries founded on those of Blackstone stray into historical disquisitions which are apt to envelop the existing law in obscurity; and, besides, the Criminal Law is contained in one of four volumes. Sir James Fitzjames Stephen's "General View of Criminal Law" does not profess to be an exposition of the offences and criminal procedure of our country: it has quite another object.

It seems, then, that there is scope for a comparatively small treatise concerning itself with the nature of crimes, the various offences punished by the law, and the proceedings which are instituted to secure that punishment. Such a work is calculated to meet the requirements of the young practitioner, who, in the first instance, wants a general introduction to the subject. It is also designed for the use of students, especially those preparing for the final examination of the Incorporated Law Society. To such, as well as to the general reader, it is hoped that the present undertaking will commend itself.

We have referred above to certain well-known works on Criminal Law. These, the reports, the older text-books, and other authorities have been made to contribute information as the occasion required. Special acknowledgment is due, and is hereby rendered, to the "General View" of Sir James Fitzjames Stephen, from which frequent quotations have been made and matter borrowed, to an extent sufficient to lead to further perusal of that work.

It is hoped that, while nothing useless and obsolete has been retained, there has not been any omission which will prevent the reader from obtaining a fair general view of the existing Criminal Law.

S. F. H.

LIVERPOOL, *Spring Assizes*, 1877.

An explanation must be given of the manner in which the punishments affixed to the various crimes are set forth in the body of the work. It was thought that much repetition might be avoided if attention were drawn to a few general rules. Only the maximum limit of penal servitude is noticed in the text, as, with very few exceptions which are specially pointed out, the minimum limit is five years. Where penal servitude may be awarded, almost without exception (any exception being mentioned), the court has the alternative of sentencing to imprisonment for a term not exceeding two years; therefore such imprisonment has not generally been specified. The rules as to hard labour, whipping, and solitary confinement are adverted to in the chapter on Punishment. A reference to the Table of Offences at the end of the volume will clear up any difficulty which may arise.

PREFACE TO THE THIRD EDITION.

THE legislation and cases belonging to the short period which has elapsed since the publication of the last edition have been embodied in this Third Edition. The work has been thoroughly revised, and it is again sent forth with the hope that a reception equally favourable with that given to the two former editions will be accorded to it.

S. F. H.

A. A.

CONTENTS.

BOOK I.

CHAP.	PAGE
INTRODUCTORY CHAPTER. CRIME	1
II. DIVISIONS OF CRIME	7
III. ESSENTIALS OF A CRIME	12
IV. PERSONS CAPABLE OF COMMITTING CRIMES	19
V. PRINCIPALS AND ACCESSORIES	34

BOOK II.

PART I.

OFFENCES OF A PUBLIC NATURE.

I. OFFENCES AGAINST THE LAW OF NATIONS	42
PIRACY	42
OFFENCES AS TO SLAVES	45
II. OFFENCES AGAINST THE GOVERNMENT AND SOVEREIGN	46
TREASON	46
MISPRISION OF TREASON	54
ATTEMPTS TO ALARM OR INJURE THE QUEEN	54
TREASON-FELONY	55
SEDITION	56
UNLAWFUL OATHS AND SOCIETIES	57
OFFENCES AGAINST THE FOREIGN ENLISTMENT ACT	59
DESERPTION, MUTINY, AND INCITING THERETO	61
ILLEGAL TRAINING AND DRILLING	62
UNLAWFUL DEALINGS WITH PUBLIC STORES	62

CHAP.		PAGE
	OFFENCES BY MEMBERS OF THE ARMY AND NAVY	63
	COINAGE OFFENCES	64
	CONCEALMENT OF TREASURE TROVE	70
III.	OFFENCES AGAINST RELIGION	72
	APOSTACY, BLASPHEMY	72
	DISTURBING PUBLIC WORSHIP	74
	WITCHCRAFT, SORCERY, &c.	74
IV.	OFFENCES AGAINST PUBLIC JUSTICE	77
	ESCAPE	77
	BREACH OF PRISON	78
	BEING AT LARGE DURING TERM OF PENAL SERVITUDE	79
	RESCUE	80
	OBSTRUCTING LAWFUL ARREST, &c.	80
	PERJURY	81
	SUBORNATION OF PERJURY	86
	VOLUNTARY OATHS	86
	FALSE DECLARATIONS	87
	BRIBERY	87
	EMBRACKERY, &c.	95
	COMMON BARRATRY	96
	MAINTENANCE	97
	CHAMPERTY	98
	COMPOUNDING OFFENCES	98
	MISPRISON OF FELONY	101
	CRIMINAL DEALINGS WITH RECORDS	101
	EXTORTION, &c.	101
	CONTEMPT OF COURT	103
V.	OFFENCES AGAINST THE PUBLIC PEACE	106
	RIOT	106
	AFFRAY	109
	CHALLENGE TO FIGHT	110
	SENDING THREATENING LETTERS	110
	LIBEL AND INDICTABLE SLANDER	111
	FORCIBLE ENTRY AND DETAINER	119
VI.	OFFENCES AGAINST PUBLIC TRADE	120
	SMUGGLING	120

CHAP.	PAGE
OFFENCES AGAINST THE BANKRUPT LAWS	122
COUNTERFEITING TRADE-MARKS	125
UNLAWFUL INTERFERENCE WITH TRADE BY COM- BINATIONS, &c.	126
VII. CONSPIRACY	130
VIII. OFFENCES AGAINST PUBLIC MORALS, HEALTH, AND GOOD ORDER	135
BIGAMY	135
INDECENT CONDUCT	137
GAMING AND GAMING HOUSES	137
COMMON OR PUBLIC NUISANCES	140
ADULTERATION AND UNWHOLESOME PROVISIONS	143
WANTON AND FURIOUS DRIVING	144
VAGRANCY	144
SENDING UNSEAWORTHY SHIP TO SEA	147
IX. OFFENCES RELATING TO GAME	148

PART II.

OFFENCES AGAINST INDIVIDUALS.

THEIR PERSONS.

INTRODUCTION	153
I. HOMICIDE	155
SUICIDE OR SELF-MURDER	161
MURDER	163
MANSLAUGHTER	169
ATTEMPT TO MURDER	175
(APPENDIX)	176
II. RAPE, &c.	179
RAPE	179
CARNALLY ABUSING CHILDREN	181
UNNATURAL CRIMES	182
ATTEMPTS TO PROCURE ABORTION	182
CONCEALMENT OF BIRTH	183
ABDUCTION	184
CHILD STEALING, ABANDONING, &c.	185

CHAP.	PAGE
III. ASSAULTS, &c.	187
COMMON ASSAULT	187
ACTUAL AND GRIEVOUS BODILY HARM	190
ASSAULT WITH INTENT TO COMMIT A FELONY	192
ATTEMPT TO CHOKE, &c., WITH INTENT, &c.	192
ADMINISTERING POISON, &c.	193
EXPLOSIVE OR CORROSIVE SUBSTANCES	193
ENDANGERING SAFETY OF RAILWAY PASSENGERS	194
ASSAULTS, &c., CONNECTED WITH WRECKES	195
FORCING SEAMEN ON SHORE	195
ASSAULTS ON OFFICERS	195
ASSAULTS ON OTHERS IN THE EXECUTION OF THEIR DUTY	196
ASSAULTS ON THOSE IN A DEFENCELESS POSITION	196
FALSE IMPRISONMENT	197

PART III.

OFFENCES AGAINST INDIVIDUALS.

THEIR PROPERTY.

I. LARCENY	198
COMPOUND OR AGGRAVATED LARCENY	219
LARCENY, &c., IN RELATION TO THE POST OFFICE	226
RECEIVING STOLEN GOODS	228
II. EMBEZZLEMENT	233
III. FALSE PRETENCES	242
FALSE PERSONATION	246
CHEATING	248
IV. BURGLARY, &c.	250
HOUSEBREAKING	256
(RECAPITULATION)	258
V. FORGERY	261
FRAUDS AGAINST LAND TRANSFER, &c., ACTS	271
VI. INJURIES TO PROPERTY	273
ARSON	273
MALICIOUS INJURY	278

BOOK III.

CRIMINAL PROCEDURE.

CHAP.	PAGE
I. PREVENTION OF OFFENCES	288
II. COURTS OF A CRIMINAL JURISDICTION	295
THE HIGH COURT OF PARLIAMENT	295
COURT OF THE LORD HIGH STEWARD	299
QUEEN'S BENCH DIVISION OF THE HIGH COURT	299
ASSIZES	301
THE HIGH COURT OF ADMIRALTY	305
CENTRAL CRIMINAL COURT	306
QUARTER SESSIONS	308
COURT OF THE CORONER	313
UNIVERSITY COURTS IN OXFORD AND CAMBRIDGE	314
(SKETCH OF A CRIMINAL TRIAL)	315
III. ARREST	317
IV. PROCEEDINGS BEFORE THE MAGISTRATE	327
V. MODES OF PROSECUTION	335
VI. PLACE OF TRIAL	352
VII. THE GRAND JURY	357
VIII. PROCESS	361
IX. CERTIORARI	366
X. TIME OF TRIAL, &c.	369
ARRAIGNMENT	370
CONFESSION	373
XI. PLEAS	375
XII. DEMURRER	382
XIII. THE PETTY JURY	385
XIV. THE HEARING	395
(APPENDIX)	401
XV. THE WITNESSES	403
CREDIBILITY OF WITNESSES	409
NUMBER OF WITNESSES	412
XVI. THE EXAMINATION OF WITNESSES	417
XVII. EVIDENCE	424
CIRCUMSTANTIAL AND PRESUMPTIVE EVIDENCE	433
WRITTEN EVIDENCE	436

CHAP.	PAGE
XVIII. VERDICT	442
XIX. JUDGMENT	447
XX. INCIDENTS OF TRIAL	449
XXI. PUNISHMENT	455
XXII. PROCEEDINGS AFTER TRIAL	467
NEW TRIAL	467
REVERSAL OF JUDGMENT BY WRIT OF ERROR	468
COURT FOR CROWN CASES RESERVED	471
XXIII. REPRIEVE AND PARDON	473
XXIV. EXECUTION	477

BOOK IV.

SUMMARY CONVICTIONS	478
PROCEEDINGS UPON SUMMARY CONVICTION	488

TABLE OF OFFENCES	502
APPENDIX—CODIFICATION OF THE CRIMINAL LAW	517
INDEX	525

ABBREVIATIONS

NOTICING

EDITIONS OF TEXT-BOOKS AND PERIODS COMPRISED IN REPORTS.

Addison . . .	Addison on Torts, 1879.
A. & E. . . .	Adolphus and Ellis's Reports, K. B., 1834-1841.
Arch.	Archbold's Pleading and Evidence in Criminal Cases, 1878.
Arch. Q. S. . .	Archbold's Quarter Sessions, 1869.
Austin	Lectures on Jurisprudence, 1869.
Bac. Abr. . . .	Bacon's Abridgment.
Barn. K. B. . .	Barnardiston's Reps., K. B., 1724-1734.
B. & Ald. . . .	Barnewall and Alderson's Reps., K. B., 1818-1822.
B. & C.	Barnewall and Cresswell's Reps., K. B., 1823-1830.
Best, Ev. . . .	Best on Evidence, 1875.
B. & S.	Best and Smith's Reps., Q. B., 1861-1870.
Bing.	Bingham's Reps., C. P., 1822-1834.
Bing. N. C. . .	" " New Cases, C. P., 1834-1840.
Bl.	Blackstone's Commentaries.
Bl. W.	Blackstone's (William) Reps. K. B., 1746-1749.
Broom, C. L. . .	Broom's Common Law, 1880.
Bull. N. P. . .	Buller's Nisi Prius.
Burn	Burn's Justice of the Peace, 1869.
Burr.	Burrow's Reps., K. B., 1756-1772.
Camp.	Campbell's Reps., Nisi Prius, 1807-1816.
C. & K.	Carrington and Kirwin's Reps., N. P., 1843-1852.
C. & M.	Carrington and Marshman's Reps., N. P., 1842.
C. & P.	Carrington and Payne's Reps., N. P., 1823-1841.
Chitty, Cr. L. .	Chitty's Criminal Law.
Chitty, St. . . .	Chitty's Statutes, 1865.
Cl. & Fin. . . .	Clark and Finnely's Reps., H. of Lords, 1831-1846.
C. B.	Common Bench Reps., 1845-1857.
C. B. (N.S.) . .	" " " New Series, 1857-1865.
Corner's Cr. Practice.	Corner's Crown Practice.
Cox	Cox's Criminal Cases, from 1843.
C. M. & R. . . .	Crompton, Meeson, and Roscoe's Reps., Exch., 1834-1836.

Dalton . . .	Dalton's Justice.
Den.	Denison's Crown Cases, 1844.
Doug.	Douglas Reps., K. B., 1778-1785.
D. & R.	Dowling and Ryland's Reps., K. B., 1822-1828.
Dowl. P. C.	Dowling's Practice Cases, K. B., 1830-1841.
East	East's Reps., K. B., 1801-1814.
East, P. C.	East's Pleas of the Crown.
Ell. & Bl.	Ellis and Blackburn's Reps., Q. B., 1851-1858.
Esp.	Espinasse's Reps., N. P., 1793-1807.
Exch.	Exchequer Reps., 1847-1857.
Fitz. St.	Stephen's General View of Criminal Law, 1863.
Fost.	Foster's Reps., Crown Law, 1742-1761.
F. & F.	Foster and Finlason's Reps., N. P., 1858-1865.
Hale, P. C.	Hale's Pleas of the Crown.
Hal. Sum.	Hale's Summary.
Hans.	Hansard's Parliamentary Reports.
Hawk.	Hawkins' Pleas of the Crown.
How. St. Tr.	Howell's State Trials.
H. & C.	Hurlstone and Coltman's Reps., Exch., 1862-1867.
Inst.	Coke's Institutes.
Jur.	Jurist Reps., 1837-1854.
Jur. (N.S.)	" " New Series, 1855-1865.
Kel.	Sir John Kelyng's Reps., K. B., 1673-1706.
L. J.	Law Journal Reps. in all the Courts, from 1831— (thus, L. J. (Q.B.), Queen's Bench Reps.; L. J. (M.C.), Magistrates' Cases).
L. R.	Law Reps. in all the Courts, from 1865.
L. T. (N.S.)	Law Times Reps., New Series, from 1859.
Leach	Leach's Crown Cases, 1730-1788.
L. & C.	Leigh and Cave's Crown Cases, 1861-1865.
Lew. C. C.	Lewin's Crown Cases, 1822-1833.
Lord Raym.	Lord Raymond's Reps., K. B., 1694-1734.
M. & S.	Maule and Selwyn's Reps., K. B., 1813-1817.
May	May's Parliamentary Practice, 1874.
Mood. C. C.	Moody's Crown Cases, 1824-1844.
Moo. & M.	Moody and Malkin's Reps., N. P., 1826-1830.
M. & R.	Moody and Robinson's Reps., N. P., 1830-1844.
Oke, Mag. Form.	Oke's Magisterial Formulist, 1876.
Oke, Mag. Syn.	" " Synopsis, 1876.

Paley, Sum. Con.	.	Paley's Summary Convictions, 1879.
Peake	.	Peake's Reps., N. P., 1790-1812.
Ph. Ev.	.	Phillip's Evidence.
Q. B.	.	Queen's Bench Reps. (Adolphus and Ellis), 1841-1852.
Rosc.	.	Roscoe's Evidence in Criminal Cases, 1878.
Russ.	.	Russell on Crimes, by Greaves, 1877.
R. & R.	.	Russell and Ryan's Criminal Cases, 1799-1824.
Ry. & M.	.	Ryan and Moody's Reps., N. P., 1823-1826.
Sm. L. C.	.	Smith's Leading Cases, 1875.
Stark. N. P. C.	.	Starkie's Reps., N. P., 1815-1823.
St. Tr.	.	State Trials.
St. Bl.	.	Stephen's Commentaries, 1880.
Str.	.	Strange's Reps., K. B., 1716-1747.
Tayl. Ev.	.	Taylor's Evidence, 1878.
T. R.	.	Term Reps. (Durnford and East), 1785-1800.
T. Raym.	.	Sir Thomas Raymond's Reps., K. B., 1660-1684.
W. R.	.	Weekly Reporter.
Willes	.	Willes' Reps., C. P., 1734-1758.

TABLE OF CASES.

	PAGE
ALLEN, R. v. (L. R. 1 C. C. R. 376; 41 L. J. (M.C.) 101)	136
Almond, R. v. (5 Burr. 2686)	117
Anderson, R. v. (L. R. 1. C. C. R. 161; 38 L. J. (M.C.) 12)	305
Archer, Langrish v. (10 Q. B. D. 44)	138
Arnold, R. v. (16 St. Tr. 764)	21
Ashford v. Thornton (1 B. & Ald. 405)	350, 384
Ashman, R. v. (1 F. & F. 88)	192
Astley, R. v. (2 East, P. C. 729)	223
——— (L. R. 1 C. C. R. 301; 40 L. J. (M.C.) 85)	244
Aston, R. v. (1 Russ. 407)	269
Atkinson, R. v. (2 Mood. C. C. 278)	234
Attorney-General v. Radloff (10 Exch. 84)	4
——— v. Sillem (2 H. & C. 526)	5
Aveson v. Lord Kinnaird (6 East, 198)	431
Aylett, R. v. (1 T. R. 69)	81
BADGER, R. v. (12 L. J. (M.C.) 66)	
Bailey, R. v. (12 Cox, 56)	234
Barker, Omichund v. (Willes, 538)	408
Barnard, R. v. (7 C. & P. 784)	244
Baronet, <i>In re</i> (22 L. J. (M.C.) 25)	331
Barrow, R. v. (L. R. 1 C. C. R. 156; 38 L. J. (M.C.) 20)	179
Barton, R. v. (3 Cox, 275)	23
Beardmore, R. v. (7 C. & P. 497)	369
Beatty v. Gillbanks (51 L. J. (M.C.) 117)	107
Beech, Blake v. (L. R. 2 Ex. D. 335)	470
Beezlen, R. v. (4 C. & P. 220)	418
Bellingham, R. v. (Coll. 636)	22
Berry, R. v. (L. R. 1 Q. B. D. 447; 45 L. J. (M.C.) 123)	372
Bertrand, R. v. (L. R. 1 Priv. Council. 520)	468
Best, R. v. (9 C. & P. 368)	100
Bird, R. v. (2 Den. 94, 98)	379
Birmingham and Gloucester Ry. Co. v. R. (9 C. & P. 469; 2 Q. B. 47)	31
Birmingham Dairy Co., Parsons v. (51 L. J. (M.C.) 111)	143
Blake v. Beech (L. R. 2 Ex. D. 335)	470
Booth, Hardman v. (1 H. & C. 803; 32 L. J. (Ex.) 105)	453
Boulter, R. v. (21 L. J. (M.C.) 57; 5 Cox, 543)	85
Bowden, R. v. (1 C. & K. 147)	258
Boyce, R. v. (1 Mood. C. C. 29)	191

	PAGE
Boyes, R. v. (30 L. J. (Q.B.) 301)	411
Brannon, R. v. (14 Cox, 394)	38
Brawn, R. v. (1 C. & K. 144)	137
Brice, R. v. (R. & R. 450)	254
Briggs, R. v. (1 Mood. C. C. 318)	191
Brighton Aquarium Co., Terry v. (L. R. 10 Q. B. 306)	75
Bromage v. Prosser (4 B. & C. 247)	277
Broom v. Eastern Counties Co. (6 Exch. 314)	32
Brown, R. v. (C. & Mar. 314)	81
—— (17 L. J. (M.C.) 145)	373
—— (10 Q. B. D. 381)	176
Bryan, R. v. (26 L. J. (M.C.) 84)	244
Bull, R. v. (9 C. & P. 22)	158
—— (2 Leach, 841)	213
Bulmer, R. v. (33 L. J. (M.C.) 171)	245
Burdett, R. v. (4 B. & Ald. 95)	57
Butcher, R. v. (2 M. & R. 228)	398
Butler, R. v. (14 Cox, 530)	331
CABBAGE, R. v. (R. & R. 292)	217
Carden, R. v. (L. R. 5 Q. B. D. 1; 49 L. J. (M.C.) 1)	112
Carr, R. v. (10 Q. B. D. 76)	306
Castro, R. v. (L. R. 5 Q. B. D. 490)	373, 457
—— v. Murray (32 L. T. (N.S.) 675)	469
Cattell v. Ireson (27 L. J. (M.C.) 167)	4
Chapple, R. v. (9 C. & P. 355)	38
Chinn v. Morris (2 C. & P. 361)	197
Chorley, R. v. (12 Q. B. 515)	468
Clark, R. v. (1 Barn. K. B. 304)	117
Cleaver v. Senande (1 Camp. 268, n.)	114
Closs, R. v. (27 L. J. (M.C.) 54)	266
Coal Consumers' Association, Rawlings v. (43 L. J. (M.C.) 111)	450
Codrington, R. v. (1 C. & P. 661)	243
Colley, R. v. (Moo. & M. 329)	418
Collicott, R. v. (R. & R. 212)	266
Collins, R. v. (5 C. & P. 305)	53
—— (33 L. J. (M.C.) 177)	17, 217
Commonwealth v. Magee (12 Cox, 549)	401
Coney, R. v. (8 Q. B. D. 534)	187
Corporation of London, R. v. (27 L. J. (M.C.) 231)	452
Crabb, R. v. (11 Cox, 85)	243
Cramp, R. v. (14 Cox, 390)	183
Cross, R. v. (2 C. & P. 483)	142
Cruse, R. v. (8 C. & P. 541)	29
Cullum, R. v. (L. R. 2 C. C. R. 28; 42 L. J. (M.C.) 64)	235
DADSON, R. v. (20 L. J. (M.C.) 57)	157
Dammaree, R. v. (8 St. Tr. 218)	50
Danby's Case (Lords' Journal, 1679)	298
Dawson and Others, Trial of (13 How. St. Tr. 456)	43
Deer, R. v. (32 L. J. (M.C.) 33)	232

	PAGE
Delaney v. Jones (4 Esp. 191)	114
Denham, Mellor v. (L. R. 5 Q. B. D. 467)	470
Denton, R. v. (21 L. J. (M.C.) 207)	8
Dixon, R. v. (3 M. & Sel. 15)	15
Donnally, R. v. (2 East, P. C. 713)	223
Duffy, R. v. (2 Cox, 45)	57
Dugdale, R. v. (Corner's Cr. Prac. 167)	449
Duncan, R. v. (7 Q. B. D. 198)	468
Dunn, R. v. (1 Leach, 57)	266
Dyer, R. v. (1 Cox, 113)	398
Dyson, R. v. (R. & R. 523)	162
 EASTERN COUNTIES CO. v. Broom (6 Exch. 314)	32
Eaton, R. v. (2 T. R. 89)	366
Edmonson v. Stevenson (Bull. N. P. 8)	114
Edwards, R. v. (4 T. R. 440)	331
(3 Cox, 82)	418
Eggington, R. v. (2 Leach, 913)	209, 224
Elsworth, R. v. (2 East, P. C. 986)	267
Esop, R. v. (7 C. & P. 456)	28, 32
Evans, R. v. (1 Russ. 426)	165
 FADERMAN, R. v. (1 Den. 569; 3 C. & K. 353)	383
Falkingham, R. v. (L. R. 1 C. C. R. 222; 39 L. J. (M.C.) 47)	186
Farler, R. v. (8 C. & P. 106)	413
Fennell, R. v. (7 Q. B. D. 147)	432
Fereus v. O'Brien (11 Q. B. D. 21)	204
Ferguson, R. v. (24 L. J. (M.C.) 61)	344
Fitzroy, Linford v. (18 L. J. (M.C.) 108)	332
Flatman, R. v. (14 Cox, 396)	214
Flattery, R. v. (L. R. 2 Q. B. D. 410; 46 L. J. (M.C.) 130)	179
Flannagan, R. v. (R. & R. 187)	252
Fletcher, R. v. (L. R. 2 Q. B. D. 43; 46 L. J. (M.C.) 4)	476
Flower v. Shaw (2 C. & K. 703)	267
Foote, R. v. (10 Q. B. D. 378)	332
Foster, R. v. (R. & R. 459)	82
Frances, R. v. (4 Cox, 57)	24
Francis, R. v. (L. R. 2 C. C. R. 128; 43 L. J. (M.C.) 97)	245, 427
Friend, R. v. (R. & R. 20)	165
Frost, R. v. (9 C. & P. 129)	50
 GALLOWAY v. Maries, (8 Q. B. D. 275)	139
Garden, White v. (10 C. B. 927)	242
Gardner, R. v. (1 C. & P. 479)	111
Garside, R. v. (2 A. & E. 266)	366
Gaylor, R. v. (7 Cox, 253)	36, 172
Gibbons, R. v. (12 Cox, 237)	136
Gillbanks, Beatty v. (51 L. J. (M.C.) 117)	107
Giles, R. v. (34 L. J. (M.C.) 50)	243
Gill, R. v. (2 B. & Ald. 204)	131
Goldsmith, R. v. (L. R. 2 C. C. R. 74; 42 L. J. (M.C.) 94)	383

	PAGE
Gordon, R. v. (Doug. 593)	49
Graham, Solomon v. (5 Ell. & Bl. 320)	364
Greenwood, R. v. (21 L. J. (M.C.) 127)	39
Griggs, R. v. (T. Raym. 1)	406
Gutch, R. v. (Moo. & M. 433)	117
 HANDLEY, R. v. (1 F. & F. 648)	185
Hardman v. Booth (1 H. & C. 803; 32 L. J. (Ex.) 105)	453
Hardy, R. v. (1 East, P. C. 60)	49
— (24 How. St. Tr. 753)	408, 422
Harper, R. v. (7 Q. B. D. 78)	266
Harvey, R. v. (1 Leach, 467)	210
Hassell, R. v. (30 L. J. (M.C.) 175)	212
Hasting's Case	297
Haynes, R. v. (1 F. & F. 666)	23
Hayward, R. v. (6 C. & P. 157)	170
Hazleton, R. v. (1 L. R. 2 C. C. R. 134; 44 L. J. (M.C.) 11)	244
Heymann, v. R. (L. R. 8 Q. B. 102, 105)	339, 383
Hibbert, R. v. (L. R. 1 C. C. R. 184; 38 L. J. (M.C.) 61)	185
Hill, R. v. (R. & R. 190)	245
Hodgkins, R. v. (7 C. & P. 298)	422
Hodgson, R. v. (3 C. & P. 422)	236
— (1 Leach, 6)	160
Holland, R. v. (2 M. & R. 351)	154, 165
Holman, R. v. (3 Jur. (N.S.) 722)	397
Holmes, R. v. (L. R. 1 C. C. R. 334; 41 L. J. (M.C.) 12)	181
Holt, R. v. (30 L. J. (M.C.) 11)	245
Horn, R. v. (48 L. T. (N.S.) 272)	456
Hornby, Weld v. (7 East, 199)	142
Horwood v. Smith (2 T. R. 750)	452
Hubbard, R. v. (14 Cox, 565)	439
Hughes, R. v. (1 Mood. C. C. 370)	234
Hunt, R. v. (3 B. & Ald. 566)	427
Hurley, R. v. (2 M. & Rob. 473)	268
 I'ANSON v. Stuart (1 T. R. 748)	115
Ion, R. v. (21 L. J. (M.C.) 166)	269
Ireson, Cattell v. (27 L. J. (M.C.) 167)	4
 JACKSON, R. v. (3 Camp. 370)	244
— (1 C. & K. 384)	236
Jacobs, R. v. (1 Mood. C. C. 140)	136
Jarrald, R. v. (32 L. J. (M.C.) 258)	255
Jenkins, R. v. (R. & R. 224)	251
Johnson, R. v. (2 East, P. C. 488)	253
—, R. v. (3 M. & Sel. 566)	9
Jones, R. v. (8 C. & P. 288)	236
— (2 C. & K. 236)	217
— (11 Cox, 544)	172
— (11 Q. B. D. 118)	136

	PAGE
Jones, Delaney v. (4 Esp. 191)	114
——, Stanley v. (7 Bing. 369)	98
——, State v. (50 New Hamp. Rep. 369)	23
Jordan, R. v. (9 C. & P. 118)	397
KEIR v. Leeman (6 Q. B. 308; 9 Q. B. 371)	100
Kenny, R. v. (L. R. 2 Q. B. D. 307; 46 L. J. (M.C.) 156)	215
Keyn, R. v. (L. R. 2 Ex. D. 63; 46 L. J. (M.C.) 17)	306
Kingston v. O'Neill (14 Cox, 466)	149
Kinnaird, Aveson v. (6 East, 198)	431
Knill, R. v. (5 B. & Ald. 929, n.)	85
Knox, Miller v. (4 Bing. (N. C.) 574)	105
LAKE, R. v. (11 Cox, 333)	247
Langmead, R. v. (L. & C. 427)	232
Langrish v. Archer (10 Q. B. D. 44)	138
Lapier, R. v. (1 Leach, 320)	224
Leach, Money v. (1 Bl. W. 555)	321
Lee, R. v. (9 Cox, 304)	243
Leeman, Keir v. (6 Q. B. 308; 9 Q. B. 371)	100
Lewis, R. v. (1 Str. 70)	82
Lindsay v. Cundy (L. R. 1 Q. B. D. 348; 45 L. J. (Q.B.) 381)	453
—— (L. R. 1 Q. B. D. 96; 46 L. J. (Q.B.) 233)	453
—— (L. R. 3 Ap. Cas. 459; 47 L. J. (H.L.) 481)	453
Lindford v. Fitzroy (18 L. J. (M.C.) 108)	332
Lister, R. v. (26 L. J. (M.C.) 26)	236
Lockett, R. v. (1 Leach, 94)	266
Long, R. v. (4 C. & P. 398)	172
Lovelass, R. v. (6 C. & P. 596)	58
Lovell, R. v. (8 Q. B. D. 185)	211
Lovett, R. v. (9 C. & P. 462)	371
Lowe, R. v.	398
MACDANIEL, R. v. (1 Leach, 45)	133
—— (Fost. 131)	164
—— (Fost. 121)	224
M'Grath, R. v. (L. R. 1 C. C. R. 205; 39 L. J. (M.C.) 7)	211, 278
M'Growther, R. v. (Fost. 13; 9 St. Tr. 566)	29
Macleod v. Wakeley (3 C. & P. 311)	113
M'Naughten, R. v. (10 Cl. & Fin. 200; 1 C. & K. 130)	22
Magee, Commonwealth v. (12 Cox, 549)	401
Mahon, R. v. (4 A. & E. 575)	188
Manning, R. v. (2 C. & K. 903)	29
Mansell, R. v. (27 L. J. (M.C.) 4)	391
Manzana, R. v. (2 F. & F. 64)	398
March, R. v. (1 C. & K. 496)	187
Maries, Galloway v. (8 Q. B. D. 275)	139
Marks, R. v. (3 East, 157)	58
Martin, R. v. (5 C. & P. 130)	165
—— (R. & R. 108)	252

	PAGE
Martin, R. v. (L. R. 1 C. C. R. 378; 41 L. J. (M.C.) 113)	450
—— (8 Q. B. D. 54)	191
Mead, R. v. (4 C. & P. 535)	203
—— (3 D. & R. 301)	367
Meadows, R. v. (2 Jur. (N.S.) 718)	397
Mellor v. Denham (L. R. 5 Q. B. D. 467)	470
Michell, R. v. (50 L. J. (M.C.) 76)	122
Middleton, R. v. (L. R. 2 C. C. R. 38; 42 L. J. (M.C.) 73)	210
Miller v. Knox (4 Bing. N. C. 574)	105
Money v. Leach (1 Bl. W. 555)	321
Moore, R. v. (3 C. & K. 319)	26
Morby, R. v. (8 Q. B. D. 571)	172
Morris, R. v. (9 C. & P. 349)	208
—— (R. & R. 270)	29
Morris, Chinn v. (2 C. & P. 361)	197
Most, R. v. (7 Q. B. D. 244)	132
Moyce v. Newington (L. R. 4 Q. B. D. 32; 48 L. J. (Q.B.) 125)	453
Mulcahy, v. R. (L. R. 3 H. L. Ap. Ca. 306)	131
Mullany, R. v. (34 L. J. (M.C.) 111)	84
Murray, Castro v. (32 L. T. (N.S.) 675)	469
 NASH, R. v. (21 L. J. (M.C.) 147)	268
Negus, R. v. (L. R. 2 C. C. R. 34; 42 L. J. (M.C.) 62)	234
Neil, R. v. (2 C. & P. 485)	142
Neville, R. v. (Peake, 91)	142
Newington, Moyce v. (L. R. 4 Q. B. D. 32; 48 L. J. (Q.B.) 125)	453
Newman, R. v. (8 Q. B. D. 706)	238
Noakes, R. v. (4 F. & F. 921, n.)	161
Norman, R. v. (C. & Mar. 501)	236
Nott, R. v. (12 L. J. (M.C.) 143)	87
 O'BRIEN, R. v. (46 L. T. (N.S.) 177)	378
O'Brien, Fereus v. (11 Q. B. D. 21)	204
O'Connor, R. v. (45 L. T. (N.S.) 512)	138, 245
O'Donnell, R. v.	398
Olifier, R. v. (10 Cox, 402)	185
Omichund v. Barker (Willes, 528)	408
O'Neill, Kingston v. (14 Cox, 466)	149
Osborn, R. v. (1 Barn. K. B. 138, 166)	114
 PARNELL, R. v. (14 Cox, 508)	130
Parsons v. Birmingham Dairy Co. (51 L. J. (M.C.) 111)	143
Partridge, R. v. (7 C. & P. 551)	232
Pater, <i>Ex parte</i> (5 B. & S. 299)	104
Patch, R. v. (1 Leach, 238)	211
Pateman, R. v. (R. & R. 455)	266
Pearce, R. v. (Peake, 75)	427
Pearson's Case (2 Lew. C. C. 144)	25
Pedley, R. v. (1 Leach, 327)	83

TABLE OF CASES.

xxvii

	PAGE
Pembilton, R. v. (L. R. 2 C. C. R. 119; 43 L. J. (M.C.) 91)	285
Pigott, R. v. (11 Cox, 45)	56
Pike, State v. (49 New Hamp. Rep. 399)	24
Price, R. v. (8 C. & P. 19)	30
Prince, R. v. (L. R. 2 C. C. R. 154; 44 L. J. (M.C.) 122)	185
Pritchard, R. v. (7 C. & P. 303)	372
Privett, R. v. (2 C. & K. 114)	218
Prosser, Bromage v. (4 B. & C. 247)	277
RADLOFF, Attorney-General v. (10 Exch. 84)	4
Ragg, R. v. (29 L. J. (M.C.) 86)	243
Ratcliffe, R. v. (52 L. J. (M.C.) 40)	181
Rawlings v. Coal Consumers' Association (43 L. J. (M.C.) 111)	450
Read, R. v. (L. R. 3 Q. B. D. 131; 47 L. J. (M.C.) 50)	200
Reed, R. v. (23 L. J. (M.C.) 25)	199
Rhodes, R. v. (2 Lord Raym. 886)	85
Rice, R. v. (3 East, 581)	110
Richards, R. v. (L. R. 2 Q. B. D. 311; 46 L. J. (M.C.) 200)	168
Ridgway, R. v. (3 F. & F. 838)	244
Riley, R. v. (22 L. J. (M.C.) 48)	212
Ritson, R. v. (L. R. 1 C. C. R. 200; 39 L. J. (M.C.) 10)	266
Roberts, R. v. (25 L. J. (M.C.) 17)	17
Robinson, R. v. (2 Burr. 799)	336
— (4 F. & F. 43)	229
Robinson, <i>In re</i> (23 L. J. (Q.B.) 286)	331
Robson, R. v. (R. & R. 413)	211
Rogers, R. v. (1 Leach, 89)	252
Rourke, R. v. (R. & R. 386)	257
Rowland, R. v. (Ry. & M. 401)	374, 405
Rowlands, R. v. (8 Q. B. D. 530)	124
Rowton, R. v. (34 L. J. (M.C.) 57)	426
Roxburgh, R. v. (12 Cox, 8)	188
Rudd, R. v. (1 Leach, 115)	374
Russell, R. v. (C. & Mar. 541)	277
— (1 Mood. C. C. 377)	253
SAINSBURY, R. v. (4 T. R. 451)	102
Salisbury, R. v. (5 C. & P. 155)	427
Salmon, R. v. (6 Q. B. D. 79)	172
Sanders, Swan v. (50 L. J. (M.C.) 67)	284
Sansome, R. v. (19 L. J. (M.C.) 143)	432
Savage, R. v. (5 C. & P. 143)	210
Scaife, R. v. (5 Jur. 700)	331
— (2 Den. 281)	431
Scattergood v. Sylvester (15 Q. B. 506)	442
Sell, R. v. (9 C. & P. 346)	373
Senade, Cleaver v. (1 Camp. 268, n.)	114
Sharman, R. v. (23 L. J. (M.C.) 51)	265
Sharpe, R. v. (26 L. J. (M.C.) 47)	5
Shaw, Flower v. (2 C. & K. 703)	267
Sherwood, R. v. (26 L. J. (M.C.) 81)	4

	PAGE
Sillam, Attorney-General <i>v.</i> (2 H. & C. 526)	5
Smetten, Taylor <i>v.</i> (52 L. J. (M.C.) 100)	142
Smith, R. <i>v.</i> (1 Mood. C. C.) 289)	405
— (R. & R. 267)	235
— (R. & R. 417)	251
— (24 L. J. (M.C.) 135)	229
— (L. R. 1 C. C. R. 266; 39 L. J. (M.C.) 112)	228
— (14 Cox, 398)	197
Smith, Horwood <i>v.</i> (2 T. R. 750)	452
Smyth, R. <i>v.</i> (5 C. & P. 201)	119
Solomon <i>v.</i> Graham (5 Ell. & Bl. 320)	364
Spanner, R. <i>v.</i> (12 Cox, 155)	254
Speed, R. <i>v.</i> (46 L. T. (N.S.) 174)	243
Spencer, R. <i>v.</i> (R. & R. 299)	234
Squire, R. <i>v.</i> (R. & R. 349)	234
Stanley <i>v.</i> Jones (7 Bing. 369)	98
Steadman, R. <i>v.</i> (Fost. 292)	170
Steel, R. <i>v.</i> (L. R. 2 Q. B. D. 37; 49 L. J. (M.C.) 1)	470
Stevenson, R. <i>v.</i> (2 Leach, 546)	450
—, Edmonson <i>v.</i> (Bull. N. P. 8)	114
Steward, R. <i>v.</i> (2 East, P. C. 702)	223
Stone, R. <i>v.</i> (4 C. & P. 379)	99
Stopford, R. <i>v.</i> (11 Cox, 643)	192
Stuart, l'Anson <i>v.</i> (1 T. R. 748)	115
Sullivan, R. <i>v.</i> (11 Cox, 44)	56, 57
Swan, Sanders (50 L. J. (M.C.) 67)	284
Swindall, R. <i>v.</i> (2 C. & K. 230)	172
Sylvester, Scattergood <i>v.</i> (15 Q. B. 506)	452
TAYLOR, R. <i>v.</i> (1 F. & F. 511)	
Taylor <i>v.</i> Smetten (52 L. J. (M.C.) 100)	142
Terry <i>v.</i> Brighton Aquarium Co. (L. R. 10 Q. B. 306)	75
Thomas, R. <i>v.</i> (Car. Sup. 295)	258
— (7 C. & P. 817)	26
— (33 L. J. (M.C.) 22)	70
Thompson, R. <i>v.</i> (1 Mood. C. C. 78)	215, 224
— (32 L. J. (M.C.) 53)	213
— (L. R. 1 C. C. R. 377; 41 L. J. (M.C.) 112)	405
Thornton, Ashford <i>v.</i> (1 B. & Ald. 405)	350, 384
Thurborn, R. <i>v.</i> (11 L. J. (M.C.) 140; 2 C. & K. 831)	215
Tite, R. <i>v.</i> (30 L. J. (M.C.) 142)	234
Tivnan, <i>In re</i> (5 B. & S. 645)	43
Toakley, R. <i>v.</i> (10 Cox, 406)	397
Tolfree, R. <i>v.</i> (1 Mood. C. C. 243)	214
Tonkinson, R. <i>v.</i> (14 Cox, 603)	212
Topham, R. <i>v.</i> (4 Tr. 126)	113
Torpey, R. <i>v.</i> (12 Cox, 45)	30
Townley, R. <i>v.</i> (L. R. 1 C. C. R. 315; 41 L. J. (M.C.) 144)	200
Trenfield, R. <i>v.</i> (1 F. & F. 43)	268
Turner, R. <i>v.</i> (8 C. & P. 755)	183

	PAGE
VAMPLEW, R. v. (3 F. & F. 520)	164
Vandercomb, R. v. (2 Leach, 708)	378
Vane, R. v. (Kel. 15)	49
Vaughan, R. v. (4 Burr. 2494)	89
Vincent, R. v. (9 C. & P. 91)	106
WAKELEY, Macleod v. (3 C. & P. 311)	113
Walker, R. v. (1 C. & P. 320)	171
Ward, R. v. (5 L. J. (K.B.) 221)	5, 141
Watkins, R. v. (1 Leach, 520)	242
Watson, R. v. (2 Starkie, N. P. C. 128)	420
Webb, R. v. (11 Cox, 133)	403
Weld v. Hornby (7 East, 199)	142
Wenborn, R. v. (6 Jur. 267)	450
Weston, R. v. (14 Cox, 346)	398
Westwood, R. v. (R. & R. 495)	252
Wheatley, R. v. (2 Burr. 1125)	4
White, R. v. (1 Burr. 333)	140
— (3 Camp. 97)	398
White v. Garden (10 C. B. 927)	242
Wilkins, R. v. (1 Dowl. P. C. 536)	450
— (1 Leach, 520)	211
Wilkinson, R. v. (R. & R. 470)	213
Williams, R. v. (1 C. & K. 195)	224
— (11 Cox, 684)	183
— (1 Cox, 363)	398
Williamson, R. v. (11 Cox, 328)	243
Willshire, R. v. (14 Cox, 541)	136
Wolstenholme, R. v. (11 Cox, 313)	236
Wood, R. v. (1 Mood. C. C. 278)	191
— (10 Cox, 573)	393
Woodgate, Wright v. (2 C. M. & R. 573)	114
Woodhall, R. v. (12 Cox, 240)	226
Wright, R. v. (2 F. & F. 320)	341
— (R. & R. 456)	421
— (27 L. J. (M.C.) 65)	235
Wright v. Woodgate (2 C. M. & R. 573)	114
YEWIN'S CASE (2 Camp. 638)	411
York's Case (Fost. 70)	27
Young v. R. (3 T. R. 105)	344
ZULUETA, R. v. (1 C. & K. 215)	45

TABLE OF STATUTES.

	PAGE		PAGE
3 Edw. 1, c. 15	331	6 Anne, c. 7	52
23 Edw. 1 (<i>Stat. de frang. pris.</i>)	79	7 Anne, c. 21, s. 11	53
1 Edw. 2, st. 2, c. 1	79	9 Anne, c. 14	139
25 Edw. 3, st. 5, c. 2	47, et seq.	1 Geo. 1, st. 2, c. 5, ss. 1, 5, 8	108, 156
5 Rich. 2, c. 8	119	6 Geo. 1, c. 19	44
13 Rich. 2, c. 5	305	8 Geo. 1, c. 24, s. 1	44
15 Rich. 2, c. 3	305	11 Geo. 1, c. 4	102
13 Hen. 4, c. 7	109	12 Geo. 1, c. 29, s. 4	97
28 Hen. 8, c. 15	43, 305	2 Geo. 2, c. 25, s. 2	86, 459
33 Hen. 8, c. 9, s. 11	32	—, c. 28	44
35 Hen. 8, c. 2, s. 1	356	9 Geo. 2, c. 5	74
1 Edw. 6, c. 1	76	11 Geo. 2, c. 19	480
5 & 6 Edw. 6, c. 16, s. 2	89	12 Geo. 2, c. 28	139
1 & 2 Mary, c. 10	54	13 Geo. 2, c. 19	139
1 Eliz. c. 2	76	16 Geo. 2, c. 31, s. 3	78
8 Eliz. c. 2	97	18 Geo. 2, c. 30	44
13 Eliz. c. 5	249	—, c. 34	139
18 Eliz. c. 5	100	19 Geo. 2, c. 21	74
27 Eliz. c. 4	249	24 Geo. 2, c. 44	321
31 Eliz. c. 5	346	25 Geo. 2, c. 37, s. 9	80
—, s. 4	352	6 Geo. 3, c. 50, s. 61	95
4 Jac. 1, c. 5	146	12 Geo. 3, c. 20	371
21 Jac. 1, c. 7, s. 3	146	—, c. 24, s. 1	276
—, c. 8	289	21 Geo. 3, c. 49	75
—, c. 15	119	25 Geo. 3, c. 18	301
16 Car. 1, c. 21	71	26 Geo. 3, c. 96	296
29 Car. 2, c. 7	75	32 Geo. 3, c. 48	301
—, c. 9	75	—, c. 60	116
31 Car. 2, c. 2	331	36 Geo. 3, c. 7, s. 1	52, 55
—, s. 5	329	37 Geo. 3, c. 70	61
—, s. 7	333	—, s. 2	352
—, s. 12	474	—, c. 123, ss. 1, 2	58
1 Wm. & M. st. 2, c. 1	331	38 Geo. 3, c. 52	353
4 & 5 Wm. 3, c. 18	364	39 Geo. 3, c. 37	305
5 & 6 Wm. 3, c. 11	368	—, c. 69, s. 1	276
7 & 8 Wm. 3, c. 3	52	—, c. 79	59
—, ss. 2, 4	53, 412	39 & 40 Geo. 3, c. 93	53, 392
—, s. 5	345	—, c. 94, s. 1	24, 444
—, s. 11	299	—, s. 2	25, 372
9 & 10 Wm. 3, c. 32 (c. 35) ss. 1-3	73	42 Geo. 3, c. 119, s. 2	142
10 & 11 Wm. 3, c. 17	142	45 Geo. 3, c. 125	296
11 & 12 Wm. 3, c. 7	305	46 Geo. 3, c. 54	305
—, ss. 8, 9	44	48 Geo. 3, c. 58, s. 1	318, 362
12 & 13 Wm. 3, c. 2	474	49 Geo. 3, c. 126, ss. 1, 3, 4	89
1 Anne, st. 2, c. 17, s. 3	52	51 Geo. 3, c. 100	353

	PAGE		PAGE
52 Geo. 3, c. 104, ss. 1, 2	58	9 Geo. 4, c. 69, s. 2	149
—, c. 155, s. 12	74	—, s. 4	150, 345
—, c. 156	78	—, s. 9	149, 311
54 Geo. 3, c. 146	53	—, s. 12	148
56 Geo. 3, c. 138, s. 2	100	11 Geo. 4 & 1 Wm. 4, c. 70, s. 35	308
57 Geo. 3, c. 6, s. 1	52	1 & 2 Wm. 4, c. 32	488
—, c. 7	61, 352	2 Wm. 4, c. 34	65
—, c. 19	59	2 & 3 Wm. 4, c. 53, s. 49	247
59 Geo. 3, c. 46	350, 384	3 & 4 Wm. 4, c. 49	408
—, c. 69	59	—, c. 82	408
60 Geo. 3 & 1 Geo. 4, c. 1, ss. 1, 2	61	4 & 5 Wm. 4, c. 36	306
—, s. 7	345	—, s. 22	43, 305
1 Geo. 4, c. 57, s. 2	461	—, c. 47	308
1 & 2 Geo. 4, c. 88, s. 1	80	—, c. 67	79
3 Geo. 4, c. 114	460	5 & 6 Wm. 4, c. 33	367, 368
4 Geo. 4, c. 48, s. 1	448	—, s. 1	368
—, c. 52, s. 1	162	—, c. 62, ss. 13, 18	87
—, c. 76, s. 21	137	—, c. 76	248
5 Geo. 4, c. 83	144	—, s. 34	87
—, s. 3	145	—, s. 103	313
—, s. 4	74, 146	—, ss. 105, &c.	313
—, s. 5	146	—, s. 121	357, 386
—, s. 15	146	6 & 7 Wm. 4, c. 30, s. 2	448
—, c. 84	474	—, c. 85, ss. 38, 39, 41	137
—, s. 22	79, 80, 355	—, c. 86, s. 41	87
—, c. 113, ss. 9-11	45	—, c. 111	428
6 Geo. 4, c. 50	385, 387	—, c. 114, ss. 3, 4	333
—, s. 1	357, 386	7 Wm. 4 & 1 Vict. c. 36	226
—, ss. 20, 29	392	—, s. 25	226
—, s. 42	387	—, s. 26	226, 459
—, s. 62	53	—, ss. 27-29	227
7 Geo. 4, c. 16, s. 38	247	—, s. 30	230
—, c. 38	305, 356	—, s. 31	227
—, c. 64, s. 4	350	—, s. 32	226
—, s. 9	338	—, s. 36	227
—, s. 12	353, 354	—, s. 37	227, 353
—, s. 13	355	—, s. 40	227
—, s. 14	338	—, s. 41	227, 230
—, s. 19	377	—, s. 42	470
—, s. 21	383	—, c. 88, ss. 2, 3	44
—, s. 22	415	—, c. 90, s. 5	462
—, s. 23	415	—, c. 91, s. 1	45, 58,
—, ss. 24, 25	415	—, s. 1	61, 80
—, s. 27	356	1 & 2 Vict. c. 38	144
—, ss. 28, 30	326	—, c. 45	332
7 & 8 Geo. 4, c. 28, s. 2	372	—, c. 77	408
—, s. 3	392	—, c. 94, s. 19	101
—, s. 4	379	2 & 3 Vict. c. 82, s. 1	356
—, ss. 8, 9	456, 462	3 & 4 Vict. c. 54, s. 3	24, 444
—, s. 10	457	4 & 5 Vict. c. 36, ss. 16-21	307, 308
—, s. 11	437, 456	5 & 6 Vict. c. 38	309
—, c. 29, s. 2	459, 462	—, c. 51	54
—, c. 53	208	—, s. 1	53
—, s. 43	478	6 Vict. c. 18	248
9 Geo. 4, c. 31, s. 2	352	—, s. 81	87
—, s. 10	46	6 & 7 Vict. c. 34	320
—, c. 32	158	—, c. 85, s. 1	403
—, c. 69, s. 1	267	—, c. 96, s. 3	119
	148, 149, 488	—, ss. 4, 5	57, 118

	PAGE		PAGE
6 & 7 Vict. c. 96, s. 6	112	12 & 13 Vict. c. 45, s. 11	498
_____ , s. 7	117	_____ c. 92, ss. 2, 13	283
_____ , s. 8	416	_____ c. 96	305
7 & 8 Vict. c. 2	305, 356	13 & 14 Vict. c. 21, ss. 7, 8	436
_____ , s. 1	43	_____ c. 25	304
_____ , s. 3	356	14 & 15 Vict. c. 19, s. 11	324
_____ c. 29	148, 488	_____ c. 55, ss. 2, 3	415
_____ , s. 1	148	_____ ss. 5, 8	326
_____ c. 71	312	_____ , s. 14	312
8 & 9 Vict. c. 68, s. 1	470	_____ , s. 18	320
_____ c. 109	139	_____ , ss. 19, 21, 23, 24	353
_____ , ss. 4, 9	139	_____ c. 99	101
_____ , s. 17	138, 245	_____ , s. 13	379, 437
9 & 10 Vict. c. 24	455	_____ , s. 16	83
_____ , s. 4	470	_____ c. 100, s. 1	340
_____ c. 33	59	_____ , s. 9	17, 216, 443
_____ c. 95, s. 111	438	_____ , s. 12	134, 244, 443
10 & 11 Vict. c. 89	147	_____ , s. 19	85
11 & 12 Vict. c. 12, s. 1	52	_____ , s. 23	337, 339, 353
_____ , ss. 3, 4	55	_____ , s. 24	208, 339
_____ , s. 6	51	_____ , s. 25	341, 377, 383
_____ , s. 7	56	_____ , s. 27	350, 383, 469
_____ c. 42	318, 488	_____ , s. 29	370
_____ , ss. 1, 2	318	_____ , s. 29	137, 460
_____ , s. 3	319, 362	15 & 16 Vict. c. 61	478
_____ , s. 4	320	16 & 17 Vict. c. 30, s. 2	291
_____ , ss. 8, 9	319	_____ , s. 3	290
_____ , s. 10	320	_____ , s. 4	300, 367
_____ , s. 11	320, 362	_____ , s. 5	300, 368
_____ , ss. 12-15	320	_____ , s. 7	368
_____ , s. 16	327, 350	_____ , s. 9	414
_____ , s. 17	327, 334, 431	_____ c. 32, s. 1	470
_____ , s. 18	328, 432	_____ , s. 4	470
_____ , s. 19	327	_____ c. 96, s. 9	197
_____ , s. 20	328, 334, 350	_____ c. 97, s. 123	197
_____ , s. 21	328	_____ c. 99	458
_____ , s. 23	330, 332	_____ , s. 6	459
_____ , s. 25	329	_____ , ss. 9-11	475
_____ , s. 27	333	_____ c. 107	120
_____ c. 43	488	_____ , s. 198	87
_____ , s. 1	489	_____ , s. 209	120
_____ , s. 2	489	_____ , ss. 218-223	122
_____ , s. 3	490	_____ , ss. 232, 235	120
_____ , s. 7	490	_____ , s. 244	121
_____ , ss. 10, 11	489	_____ , s. 245	425
_____ , s. 12	491	_____ , ss. 248-251	121
_____ , s. 13	492	_____ , s. 275	354
_____ , s. 14	493	_____ , s. 303	122, 345
_____ , ss. 15, 16	492	_____ , s. 304	352
_____ , s. 18	495	_____ c. 118	320
_____ , ss. 19, 21-23	494	_____ c. 119	139
_____ , ss. 24, 26	495	17 & 18 Vict. c. 38	139, 140
_____ , s. 35	488	_____ , s. 5	404
_____ c. 44	488	_____ c. 60, s. 3	283
_____ c. 78, s. 1	471	_____ c. 102	89
_____ , s. 2	472	_____ , s. 2	90
_____ , s. 3	471	_____ , s. 3	90, 93
_____ , s. 4	472	_____ , s. 10	311
_____ , s. 5	469		

	PAGE		PAGE
17 & 18 Vict. c. 102, s. 14 . . .	345	24 & 25 Vict. c. 96, s. 26 . . .	206
_____ c. 104, s. 206 . . .	195	_____ s. 27 . . .	203
_____ s. 207 . . .	195, 354	_____ s. 28 . . .	202
_____ s. 267 . . .	306	_____ s. 29 . . .	204, 208
_____ s. 520 . . .	354	_____ s. 30 . . .	101, 204
18 & 19 Vict. c. 91, s. 21 . . .	305, 356	_____ s. 31 . . .	201
_____ c. 96, s. 38 . . .	87	_____ s. 32 . . .	201, 207
19 Vict. c. 16 . . .	301	_____ s. 33 . . .	202, 207
_____ ss. 1, 3 . . .	368	_____ s. 34 . . .	487
_____ c. 17, s. 18 . . .	314	_____ s. 35 . . .	487
_____ c. 54, s. 1 . . .	358	_____ s. 36 . . .	202, 487
20 & 21 Vict. c. 3 . . .	79, 458, 474	_____ s. 37 . . .	487
_____ s. 2 . . .	456, 459	_____ ss. 38, 39 . . .	201
_____ s. 3 . . .	355, 356	_____ s. 40 . . .	224, 225
_____ s. 5 . . .	475	_____ s. 41 . . .	226, 443
_____ c. 43, s. 1 . . .	498, 499	_____ s. 42 . . .	225
_____ s. 2 . . .	499	_____ s. 43 . . .	224
_____ s. 14 . . .	488	_____ ss. 44-48 . . .	111
_____ c. 83 . . .	137	_____ s. 50 . . .	257
_____ c. 85, ss. 21, 25 . . .	338	_____ s. 51 . . .	250, 254
21 & 22 Vict. c. 73, ss. 9-11 . . .	309	_____ s. 52 . . .	255
_____ c. 87 . . .	89	_____ s. 53 . . .	251
22 Vict. c. 32 . . .	474	_____ s. 54 . . .	255
_____ c. 33, s. 1 . . .	333	_____ ss. 55, 56 . . .	256
22 & 23 Vict. c. 4 . . .	312	_____ s. 57 . . .	256, 257
_____ ss. 3, 4 . . .	312	_____ s. 58 . . .	256, 463
_____ c. 17 . . .	359	_____ s. 59 . . .	255
_____ c. 35, s. 24 . . .	202	_____ ss. 60, 61 . . .	257
23 & 24 Vict. c. 32, s. 2 . . .	74	_____ ss. 62, 63 . . .	221
_____ c. 75, s. 13 . . .	197	_____ s. 64 . . .	221, 353
24 & 25 Vict. c. 66 . . .	408	_____ s. 67 . . .	219
_____ c. 94, ss. 1, 2 . . .	37	_____ s. 68 . . .	237
_____ s. 3 . . .	38	_____ s. 69 . . .	222
_____ s. 4 . . .	39	_____ s. 70 . . .	222, 235, 353
_____ s. 7 . . .	355	_____ s. 71 . . .	236, 342
_____ s. 8 . . .	39	_____ s. 72 . . .	218, 236, 443
_____ s. 9 . . .	306	_____ s. 74 . . .	219
_____ c. 95 . . .	448	_____ ss. 75-77 . . .	238, 311
_____ c. 96 . . .	199	_____ ss. 78, 80 . . .	239, 311
_____ s. 1 . . .	203, 239, 251	_____ ss. 81-84 . . .	240, 311
_____ s. 2 . . .	208	_____ ss. 85, 86 . . .	241, 311
_____ s. 3 . . .	212	_____ s. 87 . . .	311
_____ s. 4 . . .	219	_____ s. 88 . . .	242, 245, 444
_____ s. 5 . . .	218, 342, 343	_____ s. 90 . . .	246
_____ s. 6 . . .	218	_____ s. 91 . . .	38, 39
_____ s. 7 . . .	456	_____ s. 92 . . .	228, 230, 483
_____ s. 8 . . .	457	_____ s. 93 . . .	231, 343
_____ s. 9 . . .	457, 487	_____ s. 94 . . .	231
_____ ss. 10, 11 . . .	207	_____ s. 95 . . .	231, 443
_____ s. 12 . . .	150, 205, 487	_____ s. 96 . . .	230, 483
_____ s. 13 . . .	150, 205	_____ s. 97 . . .	355
_____ ss. 14, 15 . . .	205, 487	_____ s. 98 . . .	230, 487
_____ s. 17 . . .	150, 206, 487	_____ s. 100 . . .	452
_____ ss. 18, 19 . . .	206, 487	_____ s. 101 . . .	99, 461
_____ s. 20 . . .	207, 487	_____ s. 102 . . .	99
_____ s. 21 . . .	487	_____ s. 103 . . .	322, 324
_____ s. 22 . . .	206, 487	_____ s. 104 . . .	323
_____ s. 23 . . .	487	_____ s. 108 . . .	493
_____ s. 24 . . .	206, 487	_____ s. 109 . . .	474

TABLE OF STATUTES.

XXXV

	PAGE		PAGE
24 & 25 Vict. c. 96, s. 110 . . .	496	24 & 25 Vict. c. 98 . . .	261
_____ , s. 114 . . .	219, 354	_____ , s. 1 . . .	51, 262
_____ , s. 115 . . .	306, 356	_____ , s. 2 . . .	262
_____ , s. 116 . . .	344, 428	_____ , s. 3 . . .	247
_____ , s. 117 . . .	437, 445	_____ , ss. 4-8 . . .	263
_____ , s. 118 . . .	293, 460	_____ , ss. 9, 10 . . .	270
_____ , s. 119 . . .	464	_____ , s. 11 . . .	459
_____ , s. 120 . . .	460	_____ , s. 12 . . .	263, 270
_____ , s. 121 . . .	461, 462	_____ , ss. 13, 14 . . .	270
_____ , s. 122 . . .	415	_____ , ss. 16-19 . . .	271
_____ c. 97 . . .	273, 278	_____ , ss. 20-23 . . .	263
_____ , ss. 1-4 . . .	273	_____ , s. 24 . . .	263
_____ , ss. 5-8 . . .	274	_____ , ss. 25, 26 . . .	263
_____ , s. 9 . . .	278	_____ , s. 27 . . .	101, 263
_____ , s. 10 . . .	278, 279	_____ , ss. 28-31 . . .	101, 264
_____ , ss. 11, 12 . . .	279, 280	_____ , ss. 32, 33 . . .	264
_____ , ss. 13, 14 . . .	279	_____ , s. 34 . . .	248
_____ , s. 15 . . .	280	_____ , ss. 35-37 . . .	264
_____ , ss. 16, 17 . . .	274	_____ , s. 38 . . .	271
_____ , s. 18 . . .	275	_____ , s. 41 . . .	353
_____ , s. 19 . . .	285	_____ , s. 44 . . .	268
_____ , ss. 20, 21 . . .	284	_____ , s. 50 . . .	306, 356
_____ , ss. 22-24 . . .	284, 487	_____ , s. 51 . . .	293, 460, 464
_____ , s. 25 . . .	282, 487	_____ , s. 52 . . .	460
_____ , ss. 26, 27 . . .	275	_____ , s. 53 . . .	462
_____ , s. 28 . . .	280	_____ , s. 54 . . .	415
_____ , s. 29 . . .	280	_____ c. 99, s. 2 . . .	65
_____ , ss. 30, 31 . . .	281	_____ , ss. 3-5 . . .	66
_____ , s. 32 . . .	283	_____ , ss. 6, 7 . . .	67
_____ , ss. 33, 34 . . .	281	_____ , ss. 8-10 . . .	68
_____ , s. 35 . . .	282, 483	_____ , s. 11 . . .	69
_____ , s. 36 . . .	282	_____ , s. 12 . . .	69, 457
_____ , s. 37 . . .	282, 445, 487	_____ , s. 13 . . .	68
_____ , s. 38 . . .	282, 487	_____ , s. 14 . . .	65, 67, 69
_____ , s. 39 . . .	285	_____ , s. 15 . . .	69
_____ , s. 40 . . .	283	_____ , ss. 16, 17 . . .	67
_____ , s. 41 . . .	283, 487	_____ , s. 18 . . .	65
_____ , s. 42 . . .	275, 280	_____ , s. 19 . . .	67
_____ , s. 43 . . .	280	_____ , ss. 20, 21 . . .	68
_____ , s. 44 . . .	276, 280	_____ , s. 22 . . .	65
_____ , ss. 45-47 . . .	280	_____ , s. 23 . . .	69
_____ , ss. 48, 49 . . .	281	_____ , s. 24 . . .	69, 425
_____ , s. 50 . . .	110	_____ , ss. 25, 26 . . .	69
_____ , ss. 51, 52 . . .	285, 487	_____ , s. 27 . . .	70
_____ , s. 54 . . .	286	_____ , s. 28 . . .	354
_____ , s. 57 . . .	323	_____ , ss. 29, 30 . . .	66
_____ , s. 58 . . .	277, 286	_____ , s. 31 . . .	324
_____ , s. 59 . . .	278, 286	_____ , s. 36 . . .	306, 356
_____ , s. 60 . . .	277, 286	_____ , s. 37 . . .	344, 428, 437
_____ , s. 61 . . .	324	_____ , s. 38 . . .	293, 460, 464
_____ , s. 66 . . .	493	_____ , s. 39 . . .	460
_____ , s. 67 . . .	474	_____ , s. 40 . . .	462
_____ , s. 68 . . .	496	_____ , s. 42 . . .	415
_____ , s. 70 . . .	437	_____ c. 100, s. 1 . . .	168
_____ , s. 72 . . .	306, 356	_____ , s. 2 . . .	448
_____ , s. 73 . . .	293, 460, 464	_____ , s. 4 . . .	132
_____ , s. 74 . . .	460	_____ , s. 5 . . .	172, 460
_____ , s. 75 . . .	461, 462	_____ , s. 7 . . .	158
_____ , s. 77 . . .	415	_____ , s. 9 . . .	356

	PAGE		PAGE
24 & 25 Vict. c. 100, s. 10 . . .	355	25 & 26 Vict. c. 114, s. 2 . . .	150, 488
_____, s. 11 . . .	17, 175	26 Vict. c. 29 . . .	89
_____, ss. 12-14 . . .	17, 176	_____, s. 7 . . .	433
_____, s. 15 . . .	17, 163, 176	26 & 27 Vict. c. 44 . . .	192, 224, 462
_____, s. 16 . . .	110	_____, c. 73, s. 14 . . .	247
_____, s. 17 . . .	195	_____, c. 87, s. 9 . . .	241
_____, s. 18 . . .	81, 191	_____, c. 103, s. 1 . . .	218, 493
_____, s. 20 . . .	191	27 & 28 Vict. c. 47, s. 2 . . .	39, 255, 344
_____, s. 21 . . .	192	_____, s. 6 . . .	456, 459
_____, s. 22 . . .	192, 483	_____, ss. 4-10 . . .	323
_____, ss. 23-25 . . .	193	_____, s. 2 . . .	475
_____, s. 26 . . .	196	28 Vict. c. 18, s. 2 . . .	396, 397
_____, s. 27 . . .	186	_____, s. 3 . . .	421
_____, ss. 28, 29 . . .	193	_____, ss. 4, 5 . . .	410
_____, s. 30 . . .	194	_____, s. 6 . . .	411
_____, s. 31 . . .	151	_____, s. 7 . . .	439
_____, s. 32 . . .	194	_____, s. 8 . . .	267, 440
_____, s. 33 . . .	194, 483	28 & 29 Vict. c. 124, ss. 8, 9 . . .	246
_____, s. 34 . . .	194	_____, c. 126, s. 19 . . .	461
_____, s. 35 . . .	144	_____, s. 37 . . .	78
_____, s. 36 . . .	196	_____, sched. I . . .	329, 461
_____, s. 37 . . .	195	29 & 30 Vict. c. 25, s. 15 . . .	263
_____, s. 38 . . .	81, 192, 196	_____, ss. 20, 21 . . .	270
_____, ss. 39, 40 . . .	129	_____, c. 52 . . .	415
_____, ss. 42, 43 . . .	189, 485	_____, c. 108, ss. 15-17 . . .	241
_____, s. 44 . . .	190, 379	_____, c. 109 . . .	64
_____, s. 45 . . .	190, 369, 486	_____, s. 10 . . .	62
_____, s. 46 . . .	189, 486	_____, s. 34 . . .	276
_____, s. 47 . . .	188, 190	_____, c. 117, s. 14 . . .	464
_____, ss. 48, 49, 52 . . .	181	_____, c. 118 . . .	465
_____, s. 53 . . .	184	30 & 31 Vict. c. 35 . . .	360
_____, ss. 54, 55 . . .	185	_____, s. 2 . . .	360
_____, s. 56 . . .	186	_____, s. 3 . . .	328, 334, 431
_____, s. 57 . . .	136, 353	_____, s. 4 . . .	333
_____, s. 58-60 . . .	183	_____, s. 5 . . .	416
_____, s. 61 . . .	182	_____, s. 6 . . .	438
_____, s. 62 . . .	182	_____, s. 8 . . .	395
_____, s. 63 . . .	180	_____, s. 9 . . .	452, 454
_____, s. 66 . . .	323	_____, s. 10 . . .	361
_____, s. 67 . . .	39, 168	_____, c. 102, s. 49 . . .	89, 90
_____, s. 68 . . .	306, 356	_____, c. 124, s. 11 . . .	356
_____, s. 69 . . .	460	_____, c. 131, s. 35 . . .	247
_____, s. 70 . . .	461, 462	31 Vict. c. 24, s. 2 . . .	477
_____, s. 71 . . .	460, 464	31 & 32 Vict. c. 45, part 3, ss. 28, 42, 43, 51, 52, 55 . . .	206
_____, s. 77 . . .	415	_____, c. 110, s. 20 . . .	228
_____, c. 134, s. 221 . . .	459	_____, c. 116, s. 1 . . .	214, 228
25 & 26 Vict. c. 18 . . .	461	_____, c. 119, s. 5 . . .	241
_____, c. 65 . . .	307	_____, c. 125, ss. 43-47 . . .	89, 90
_____, c. 67 . . .	265, 272	32 & 33 Vict. c. 49, s. 8 . . .	271
_____, ss. 44, 45, 47 . . .	272	_____, c. 62 . . .	122
_____, c. 88 . . .	125, 265	_____, s. 11 . . .	122
_____, ss. 2, 3 . . .	125	_____, ss. 12, 13 . . .	124
_____, s. 4 . . .	126	_____, s. 14 . . .	87, 124
_____, s. 5 . . .	125	_____, s. 16 . . .	124
_____, ss. 14, 18 . . .	126	_____, s. 18 . . .	124, 360
_____, c. 89, s. 166 . . .	241	_____, s. 20 . . .	310
_____, c. 107 . . .	387	_____, c. 68, s. 4 . . .	408
_____, c. 114 . . .	148	_____, c. 71, s. 10 . . .	438

TABLE OF STATUTES.

xxxvii

	PAGE		PAGE
32 & 33 Vict. c. 71, s. 86 . . .	125	36 & 37 Vict. c. 66, s. 45 . . .	270
c. 73, s. 23 . . .	227	s. 47 . . .	470-472
33 & 34 Vict. c. 14, s. 5 . . .	394	c. 71, s. 13 . . .	283
, c. 23, s. 1 . . .	10, 54, 163	c. 88 . . .	45
, s. 2 . . .	369, 465	37 & 38 Vict. c. 36, ss. 1, 2 . . .	247
, s. 3 . . .	466	s. 3 . . .	311
, s. 4 . . .	416, 466	c. 88, ss. 40, 46 . . .	87
, s. 5 . . .	466	38 & 39 Vict. c. 24 . . .	237, 265
, ss. 9, 18, 21 . . .	465	c. 25 . . .	62, 425
, s. 31 . . .	466	s. 4 . . .	62
c. 58, s. 3 . . .	54	ss. 5, 7-11 . . .	63
, s. 4 . . .	264	c. 55 . . .	141
, s. 6 . . .	247	c. 63, ss. 4, 5, 25, . . .	143, 144
c. 65, s. 3 . . .	264	c. 77, s. 8 . . .	304
c. 76 . . .	93	c. 80 . . .	75
c. 77 . . .	125	c. 86 . . .	127
, s. 6 . . .	385, 387	s. 3 . . .	129
ss. 8, 9 . . .	394	ss. 4, 5, 7, 9, 11 . . .	128
, s. 10 . . .	386	c. 87 . . .	265
, s. 12 . . .	386, 390	ss. 99-101 . . .	272
, s. 20 . . .	386	c. 88, s. 4 . . .	147, 404, 425
, s. 23 . . .	387	c. 91 . . .	265
c. 90 . . .	393	c. 94, ss. 3, 4 . . .	181
ss. 4-11 . . .	59	39 & 40 Vict. c. 57 . . .	302
ss. 17, 18, 20 . . .	60	40 Vict. c. 14, s. 1 . . .	406, 440
c. 93, s. 11 . . .	61	40 & 41 Vict. c. 46 . . .	302
c. 98, s. 18 . . .	338	41 Vict. c. 19 . . .	485
34 & 35 Vict. c. 31, s. 2 . . .	264, 271	41 & 42 Vict. c. 19 . . .	189
c. 32 . . .	127	c. 37, s. 20 . . .	263, 269
c. 78, s. 10 . . .	127	c. 49, s. 25 . . .	315
c. 87 . . .	241	s. 26 . . .	249
c. 103, s. 30 . . .	75	s. 48 . . .	315
c. 108, s. 7 . . .	386	c. 73 . . .	305
c. 112 . . .	145	42 Vict. c. 1 . . .	302
ss. 3-5 . . .	293	c. 11 . . .	429
, s. 6 . . .	293, 475	42 & 43 Vict. c. 22, ss. 2, 5, 7, 8 . . .	351
, s. 7 . . .	293	c. 33 . . .	61
, s. 8 . . .	294	s. 12 . . .	62
ss. 10, 11 . . .	294, 463	s. 138 . . .	64
, s. 12 . . .	231, 394	s. 146 . . .	61
, s. 13 . . .	196, 294	s. 149 . . .	63, 404
, s. 16 . . .	294	s. 155 . . .	406, 440
, s. 18 . . .	231, 294	c. 49, s. 8 . . .	495
, s. 19 . . .	437, 445	s. 10 . . .	461, 483
, s. 20 . . .	229, 294	s. 11 . . .	461, 484
35 & 36 Vict. c. 33 . . .	427	s. 12 . . .	484
, s. 3 . . .	445	ss. 13, 14 . . .	485
, s. 24 . . .	90, 248	s. 15 . . .	483
c. 42, s. 12 . . .	264	s. 16 . . .	480
c. 52 . . .	92	s. 17 . . .	481
c. 93, s. 30 . . .	300	s. 18 . . .	496
, s. 38 . . .	454	s. 20 . . .	491
c. 94, s. 12 . . .	232	s. 21 . . .	494
36 & 37 Vict. c. 38, s. 3 . . .	147	s. 25 . . .	440
c. 66, s. 11 . . .	138, 145	s. 27 . . .	379, 454, 480
ss. 18, 19 . . .	307	s. 28 . . .	416, 495
ss. 29, 37 . . .	470	ss. 31, 32 . . .	497
	304		

	PAGE		PAGE
42 & 43 Vict. c. 49, s. 33 . . .	498	45 & 46 Vict. c. 50, ss. 77-80 . . .	95
_____, s. 43 . . .	494	_____, c. 75, ss. 12, 16 . . .	215
_____, s. 46 . . .	479, 480	46 Vict. c. 3, s. 2 . . .	279
_____, sched. ii. . .	488	46 & 47 Vict. c. 51 . . .	89
_____, c. 55, s. 1 . . .	255, 456, 459	_____, ss. 1, 2 . . .	91
_____, s. 2 . . .	463	_____, ss. 4, 5 . . .	94
43 Vict. c. 9 . . .	61	_____, s. 6 . . .	92, 94
43 & 44 Vict. c. 35 . . .	204	_____, ss. 7, 8 . . .	92
_____, c. 45, s. 2 . . .	182	_____, s. 9 . . .	93
44 & 45 Vict. c. 24 . . .	480	_____, s. 10 . . .	93, 95
_____, c. 51 . . .	204	_____, s. 11 . . .	95
_____, c. 60, s. 2 . . .	117	_____, ss. 13-15 . . .	94
_____, s. 3 . . .	118	_____, s. 21 . . .	94
45 Vict. c. 9, s. 3 . . .	265	_____, s. 51 . . .	94
45 & 46 Vict. c. 19, ss. 2, 3 . . .	163		

PRINCIPLES OF THE CRIMINAL LAW.

BOOK I.

INTRODUCTORY CHAPTER.

CRIME.

THE term "*crime*" admits of description rather than Crime. definition. There are no certain and universal intrinsic qualities which at once stamp an act with the character of a crime. We term a flagitious act a crime rather on account of its consequences than from any regard to such intrinsic characteristics. Thus, turning to one of the most satisfactory explanations of the term under consideration, we learn that it is "an act of disobedience to a law forbidden under pain of punishment" (a).

The question at once presents itself, What are the Punishments. distinguishing marks of "punishments"? This will, perhaps, be seen most clearly by a contrast. Sanctions (that is, evils incurred by a person in consequence of disobedience to a command, and thus enforcing that command) fall under two heads:—

1. Those which consist in the wrongdoer being obliged to indemnify the injured party, either in the way of damages or of specific performance.
2. Some sufferings experienced by the wrongdoer.

(a) Fitz. St. i.

In the first case the enforcement of the sanction is in the discretion of the injured party (or his representative), and its object is his advantage.

In the second case the sanction is imposed for the public benefit, and is enforced or remitted at the discretion of the sovereign body (*b*) as the representative of the public, such discretion being exercised according to law (*c*).

Crimes and
Civil Injuries
contrasted.

Here we arrive at the true ground of distinction (or rather difference, inasmuch as the two terms do not exclude each other, and therefore cannot be distinguished (*d*)) between Crimes and Civil Injuries or Torts. The difference is not a difference between the tendencies of the two classes of wrongs, but a difference between the modes in which they are respectively pursued; that is, whether as in the first or second of the cases mentioned above (*e*).

That there is nothing in the nature of a crime which, *per se*, determines that a particular wrongful act should be necessarily relegated to the category of crime, two considerations will suffice to show. First, In different countries and at different eras in the history of the same country the line between *civil* and *criminal* is, and has been, utterly different. For example, at Rome theft was regarded as a civil injury, for which pecuniary redress had to be made. And we have only to point back to the Anglo-Saxon system to illustrate the narrowness of the domain of criminal

(*b*) Sometimes the exercise of this discretion is deputed to some member of the sovereign body—*e.g.*, in England, to the king or queen.

(*c*) Fitz. St. 4; Austin, 518.

(*d*) "To ask whether an act is a crime or a tort, is like asking whether a man is a husband or a brother."—Fitz. St. 7.

(*e*) Austin, 417. A good description of crimes having in view the true ground of difference is given in Bishop, 1 Cr. L. § 43. "Those wrongs which the government notices as injurious to the public, and punishes in what is called a criminal proceeding, in its own name."

law in rude societies. The second consideration is, that the same wrongful act is regarded as a crime or a civil injury according as it is viewed and proceedings are taken with reference to the one or the other sanction. In the English law the best examples of this are libels and assaults. The same writings, or the same actions, may be made the subject of civil or of criminal proceedings. If A. write of B. that he is a swindler, B. may either indict A. for the crime, or bring an action against him for the civil injury (*f*).

It may be well to interpose an explanation of the courses open to the injured person when the same wrong is both a crime and a civil injury. He has not always the power of choosing in which way he will proceed. The rule is based on the distinction of crimes into felonies and misdemeanors (*g*). It used to be considered that in the case of felonies the crime must be prosecuted before civil redress can be sought from the wrongdoer. In misdemeanors there is no such distinction; either proceeding may be taken first, or both may be pursued concurrently (*h*).

The same act the subject of both civil and criminal proceedings.

Before leaving the subject of the difference between crimes and civil injuries, two other false and groundless distinctions may be adverted to. Firstly, The distinction does not consist in this, that the mischief of crimes (as a class) is more extensive than that of civil injuries (as a class); nor, secondly, in this, that the end of the sanction in the case of crimes is prevention, in the case of civil injuries redress to the injured party (*i*).

How nearly the two classes are related, even when the

(*f*) Austin, 417, 518.

(*g*) v. p. 8.

(*h*) It is doubtful whether the omission to prosecute would now be considered a good plea in bar of the action. v. Addison on Torts, pp. 65, 66.

(*i*) Austin, 417, 520.

act cannot be regarded as common to both, an example will serve to show. A. knowingly, fraudulently, and with intent to deceive B., sells him a quantity of beer short of the just measure. This was held to be only an inconvenience and injury to a private person, which might have been guarded against with due caution (*k*). But if the defect in the amount had been owing to a false vessel for measuring, A. would have been indictable. So was S., who delivered a quantity of coals, to his knowledge weighing 14 cwt.,—he falsely and fraudulently representing that the quantity he had delivered weighed 18 cwt., and thereby obtaining the price of 18 cwt. (*l*).

Proceedings,
civil or
criminal?

It is often of the utmost importance to determine whether a particular proceeding is a criminal or a civil proceeding. Thus, the evidence of the defendant may be required; and this is not allowed to be given in criminal, though of course it is in civil trials. The question arose on an information for the recovery of penalties for smuggling, under a particular statute (*m*). The true test is whether or not the infliction of punishment follows on the result being unfavourable to the defendant. If the end of the proceeding is that the defendant is required to pay a sum of money, the question will resolve itself into the form, whether the fine is a debt or a punishment (*n*).

Morality and
Crime.

The moral nature of an act is an element of no value in determining whether it is criminal or not. On the one hand, an act may be grossly immoral, and yet it may not bring its agent within the pale of the criminal law—as in the case of adultery. “Human laws are made, not to punish sin, but to prevent crime and

(*k*) *R. v. Wheatley*, 2 Burr. 1125.

(*l*) *R. v. Sherwood*, 26 L. J. (M.C.) 81.

(*m*) *Attorney-General v. Radloff*, 10 Exch. 84.

(*n*) *Cattell v. Ireson*, 27 L. J. (M.C.) 167.

mischievous" (o). On the other hand, an act perfectly innocent, from a moral point of view, may render the doer amenable to punishment as a criminal. To take an extreme example: W. was convicted on an indictment for a common nuisance, for erecting an embankment which, although it was in some degree a hindrance to navigation, was advantageous in a greater degree to the users of the port (p). Here the motive, if not praiseworthy, was at least innocent. The fact that the motive of the defendant was positively pious and laudable has not prevented a conviction (q).

This forces upon our notice a division of crimes into *mala in se* and *mala quia prohibita*; a distinction which is of little practical importance in our English system, and which must necessarily vary with the standard of good and bad (r). There will always be some crimes which naturally take their place in the one class or the other—for example, no one will hesitate to say that murder is *malum in se*, or that the secret importation of articles liable to custom is merely *malum quia prohibitum*; but between these offences there are many acts which it is difficult to assign to their proper class.

Some acts have been recognised as crimes in the English Law from time immemorial, though their punishment and incidents may have been affected by legislation. Thus murder and rape are crimes at common law. In other cases, acts have been pronounced crimes by particular statutes, which have also provided for their punishment—e.g., offences under the Bankruptcy Laws.

(o) *Attorney-General v. Sillem*, 2 H. & C. 526.

(p) *R. v. Ward*, 5 L. J. (K.B.) 221.

(q) *R. v. Sharpe*, 26 L. J. (M.C.) 47.

(r) Austin, 590.

Division of the
subject.

In treating of the Criminal Law, or the Pleas of the Crown (*s*), the subject naturally divides itself into two portions. The first, dealing with crimes generally and the various individual crimes, their constituents, their differences, appropriate punishments, and other incidents, may be termed—*The Law of Crimes*. The second, dealing with the machinery by means of which these crimes are prevented, or, if committed, by means of which they meet with their punishment, may be termed—*The Law of Criminal Procedure*.

(*s*) So called because the king is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is, therefore, in all cases the proper prosecutor for every public offence. 4 Bl. 2.

CHAPTER II.

DIVISIONS OF CRIME.

Crime.—Offence.—These terms are sometimes used synonymously of the whole of illegal acts which entail punishment. Each of them, however, has sometimes a narrower signification; and in this sense they are opposed to each other, and divide between them the whole field of acts which each in its wider sense covers. The latter use is that which confines the term “offence” to acts which are not indictable, but which are punished on summary conviction; while “crime” is restricted to those which are the subjects of indictment.

Explanation of
leading terms
in Criminal
Law.

Indictable Crimes.—All treasons, felonies, and misdemeanors, misprisions of treason and felony (t), whether existing at common law or created by statute, are the subjects of indictment. So also are all attempts to commit any of these acts (u); and even an intention to commit high treason is indictable. Further, if a statute prohibits a matter of public grievance, or commands a matter of public convenience (such as the repairing of highways or the like), all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute does not manifestly seem to exclude this mode of proceeding (v). But it is otherwise if the rights which are regulated are merely private. If the statute on which the indictment is

(t) v. p. 8.

(u) v. p. 16.

(v) 2 Hawk. c. 25, s. 4.

framed is repealed, no proceedings can be taken, provided at least the prisoner has not pleaded (x).

Misprision.—In general this term signifies some neglect or contempt, especially when a person, without assenting thereto, knows of any treason or felony and conceals it (y). But it is also applied to every great misdemeanor which had no certain name given to it in the law; for example, the maladministration of public officers. The former kind is sometimes termed *negative*, the latter *positive* misprision.

The main classification of indictable crimes is three-fold—Treason, Felony, Misdemeanor—though “treason” is strictly included in the term “felony.”

Felony.—Misdemeanor.—It will be remembered that in contrasting crimes and civil injuries, we found that there were no intrinsic qualities the possession of which assigned an act to either class. In distinguishing felony from misdemeanor we shall also find that the difference is only one founded on the consequences of each. But the latter classification is exhaustive, and not a cross-division, as in the case of crimes and civil injuries, inasmuch as the same act cannot be both a felony and a misdemeanor.

It is a popular idea, which to a certain extent the law has countenanced, that the distinction into felonies and misdemeanors is one founded on the degree of enormity of the crime. That this is not the case necessarily will be seen when we consider what offences belong to the one class and what to the other. No one will maintain that perjury, which is a misdemeanor, is of less gravity than simple larceny, which is a felony.

(x) *R. v. Denton*, 21 L. J. (M.C.) 207.

(y) *v. pp.* 54, 101.

As a rule, however, the more serious crimes are felonies.

What, then, is the origin and force of this distinction, a distinction attended with important consequences? To obtain an answer we must look back to the period of feudal law. The term "*felony*" is derived from two words (z), the one signifying a fief or feud, the other price or value. Thus the term was applied to those offences which resulted in the tenant's forfeiture of his *land* to the lord of the fee; though primarily it signified the penal consequences, i.e., the forfeiture, of these offences. By another slight deflection the term was extended to offences which involved forfeiture of *goods*. Blackstone thus defines a felony to be "an offence which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment *may* be superadded according to the degree of guilt" (a). Capital punishment, associated in the popular mind with felony, was an usual, though not a necessary, incident. Petit-larceny was a felony, but not capitally punished; standing mute at a trial was punished with death, though not a felony. Though the ground of distinction into felony and misdemeanor was the consequence of the crime, of course originally there must have been some reason for attaching the graver consequences to one act and not to another. This was furnished by a consideration of the gravity and commonness of the offence, a consideration not attended to in later periods (b).

It may be noticed that where a statute declares that an offender against its provisions shall be deemed to have *feloniously* committed the act, the offence is thereby made a felony (c).

(z) Fee-lon. For some conjectural derivations, v. 4 St. Bl. 7.

(a) 4 Bl. 95.

(b) Fitz. St. 57.

(c) *R. v. Johnson*, 3 M. & Sel. 556.

"*Misdemeanor*" is to be regarded as a negative expression; being applied to indictable crimes not falling within the class of felonies (*d*). In a wide and general sense, the term is also used synonymously with "crime."

Abolition of
forfeiture.

Recently (1870) the legislature struck at the root of the distinction we have been treating of; but the terms "felony" and "misdemeanour," having become firmly attached to the various indictable offences, still remain. It was provided that no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any *forfeiture* or escheat (*e*).

Incidents of
felonies and
misdemeanors
contrasted.

In addition to the distinction as to forfeiture, which we have just seen to be a thing of the past, there are other points, some nominal, others real, which distinguish felonies from misdemeanors:—

i. As to *arrest*.—It will suffice here to state generally that an arrest is justifiable in certain cases of supposed felony, where it would not be in cases of supposed misdemeanor (*f*).

ii. As to the *trial*.—Misdemeanors may be tried upon an indictment, inquisition, or information; felonies upon the first two only.

The right of peremptory *challenge* is confined to those charged with felony.

(*d*) "Their general name—misdemeanors—bad behaviour—happily describes their general character. The principal offences included under this head are libel, conspiracy, and nuisance. The connection between them may not, at first sight, be apparent; but a comparison of their definitions will show that though, in some respects, they are dissimilar, the essence of all these offences is the same. . . . Each of these offences is based upon the notion of a normal state of repose and general order, which it is criminal to disturb either by writing, by any combination, or by any wilful act or omission."—Fitz. St. 145.

(*e*) 33 & 34 Vict. c. 23, s. 1.

(*f*) v. p. 323 *et seq.*

The legislature requires that certain terms of penal servitude should be inflicted on those convicted of felony after a *previous conviction* for felony, or for certain misdemeanors: whereas there is no such provision with regard to misdemeanors committed after a previous conviction.

On minor points there is also a difference, *e.g.*, the form of oath taken by the jury (*g*); the mode of swearing the jury; again, in misdemeanor the defendant is not given in charge to the jury (*h*); and in felonies the prisoner must be present throughout the trial, and the jury, when the trial has once commenced, are not allowed to separate till their verdict has been given, or they have been discharged from giving a verdict; while a case of misdemeanor may be tried although the accused be not present, if he have previously pleaded (*i*), and the jury are allowed to separate in the course of the trial just as in civil cases.

iii. As to the *civil remedy*.—As we have seen (*j*), the felony must be prosecuted before a civil action is commenced with reference to the same act; in misdemeanor there is no such necessity.

(*g*) v. p. 395.

(*h*) v. p. 396.

(*i*) 8th report of the Commissioners on Criminal Law, p. 143; 1 Chitty, Cr. L. 532; Arch. 155; v. also p. 373.

(*j*) v. p. 3.

CHAPTER III.

ESSENTIALS OF A CRIME.

IN order to ascertain who are and who are not capable of committing crimes, it will be necessary to examine certain terms which are liable to confusion.

In the first place, we must deal with those elements which occur in every case of crime; and the absence of either of which excludes the act from the category of crimes, viz., *Will*, *Criminal Intention*, or *Malice*. It will be more convenient to treat of them in this order, though obviously the reverse of the actual sequence of events.

Will. To *will* an act is "to go through that inward state which, as experience informs us, is always succeeded by motion" (*k*); that is, unless the body be physically incapable. And will is to be distinguished from those wishes which are not carried into execution; for example, excited by jealousy, I wish to kill B., but fear of the law prevents me from willing that act. If the act be not willed, it is said to be *involuntary*, and of course does not render its doer amenable to the criminal law.

Intention. *Intention* is the "fixing the mind upon the act, and thinking of it as of one which will be performed when the time comes" (*l*), and when the time comes (if it ever does) the act is willed. The willing may succeed

(*k*) Fitz. St. 77.

(*l*) *Ibid.*

the intention instantaneously, or years may intervene between the formation of the intention and the exercise of the will. An example will explain the relation of the two terms more clearly. A hates B. In consequence of this hatred A., on meeting B., shoots him dead. Here A. makes up his mind to shoot B. when he meets him; up to this point, as long as the two are separated, A.'s intention only is formed. He meets B. in the road, and carries out his design or intention by pulling the trigger. Now he wills the act; that is, he wishes it in such a way as to cause the motion of his arm and finger (m).

In this example a third element appears. The *Motive*. *motive* of the act is the deadly hatred. Motive may be defined as "that which incites and stimulates to action." It may serve as a clue to the intention; but it is the intention which determines the quality, criminal or innocent, of the act (n).

So much for intention generally. But to make a person a criminal, the intention must be a state of mind forbidden by the law. I utter a forged note, not knowing it to be such, and therefore not intending to defraud. No crime is committed. But if I have such intention, this criminal intention stamps the act with the character of crime (o). The guilty state of mind, or criminal intention, is generally known by the term "*Malice*," a term which is truly a legal enigma, on account of the many and conflicting senses in which it is used. As synonymous with criminal intention, it is thus necessary to the legal conception of crime. To secure a conviction, as a general rule, malice of this

(m) "Though usually both intention and will are found in an act, either or both may be absent. Both are wanting when a man in a convulsive fit strikes and kills another. Intention is absent in the case of an infant."
—V. Fitz. St. 78.

(n) Broom, C. L. 871.

(o) V. Fitz. St. 81.

kind must be directly proved. But when the law expressly declares an act to be criminal, the question of intention or malice need not be considered; at least, except by the judge in estimating the amount of punishment (*p*). Again, in some cases, this intention is presumed from a circumstance, and it lies on the accused to show that his intention was innocent, *e.g.*, in the case of possession of recently stolen goods (*q*).

Malice, active
or passive.

This malice is found not only in cases

I. Where the mind is *actively* or *positively* in fault, as where there is a deliberate design to defraud; but also

II. Where the mind is *passively* or *negatively* to blame, that is, where there is culpable or criminal inattention or negligence. A common example of this is manslaughter by a surgeon who has shown gross incompetence in the treatment of the deceased. But here the criminality consists in the wilfully incurring the risk of causing loss or suffering to others (*r*). So that, in fact, the malice is only traced one stage further back. An extreme case of this negative malice is where there is merely the absence of a thought which ought to have been there, as in the non-repair of roads through forgetfulness.

Malice, express
or implied.

It is usual to lay down that malice is either

1. *Express*, or *in fact*, as where a person with a deliberate mind and formed design kills another.

2. *Implied*, or *in law*, as where one wilfully poisons another, though no particular enmity can be proved;

(*p*) Broom, C. L. 872.

(*q*) v. p. 232.

(*r*) Broom, C. L. 874.

or where one gives a perfect stranger a blow likely to produce death. Here there is a wilful doing of a wrongful act without lawful excuse; and the intention is an inference of law resulting from the doing the act (*s*). The law infers that every man must contemplate the necessary consequences of his own act (*t*).

Here, and everywhere in dealing with malice, there is great danger of deflection into malice with its moral signification, as denoting ill-will or malevolence. In other words, of confounding motive with intention. Malice, in the sense of malevolence, is not essential to a crime; malice, in its legal signification of criminal intention, is (*u*).

As we have seen, it is the character of the intention that determines the character of the act; though other considerations, for example, motives, are taken into account in order to discover the intention. The same act may be wholly innocent, a civil injury, or a crime, according to the intention. For example, A. takes a horse from the owner's stable without his consent. If he intend to fraudulently deprive the owner of the property and appropriate the horse to himself, he is guilty of the crime of larceny. If he intend to use it for a time and then return it, it is a trespass or civil injury only. If he take it in due course as distress for rent, he is justified and not exposed to any ill consequences (*x*).

Intention,
the test of
criminality.

But a naked intention is not criminally punishable, except, as it is said, in treason. There must be some

(*s*) 4 Bl. 199, v. p. 166.

(*t*) *R. v. Dixon*, 3 M. & Sel. 15.

(*u*) "In the use of the word 'malice,' in all cases there is undoubtedly always a lurking reference to some sort of moral depravity, though perhaps only of a temporary sort. But the intangible nature of such an element compels the legislature and the judge to select certain determinate signs as essential characteristics of this depravity."—Amos, Jurisprudence, 305.

(*x*) Broom, C. L. 871.

carrying out, or attempt to carry out, that intention into action. In other words, the intention is to be inferred from some overt act, or in the case of a crime of omission, from the absence of some overt act. Thus, although A. has resolutely made up his mind to shoot B. when next he meets him, and confesses this resolution, the law is powerless to deal with him; but directly he does anything in pursuance of that design, he is within the grasp of the law. The reason for this rule is obvious, namely, the difficulty, or rather impossibility, of proving a mere intention.

If there be present a criminal intention, the prisoner is not exculpated because the results of the steps he takes to carry out that intention are other than those he anticipated or intended. For example, if A., intending to shoot B., shoots C., mistaking C. for B. To such a length is this doctrine extended, that if A. shoots at B.'s poultry and by accident kills a man, if his intention be to steal the poultry, he will be guilty of murder. The act, viz., the shooting, is willed, and the intention is criminal (and felonious); therefore the essentials of a crime are furnished, and the result determines what the crime is. This is not the only respect in which the gravity and nature of the crime are determined by circumstances over which he has not control. Thus, if B. receives a blow from A., and, through the unskilful treatment of the wound by the surgeon, dies, A. will be guilty of murder or manslaughter. The intention is, then, not the sole gauge of criminal liability.

Attempts.

Though a mere intention is not punishable, an attempt to commit a crime is itself a crime, and therefore the subject of punishment. That which the law wishes to discover is the intention, and an attempt equally with a completion of the offence will be evidence of this. What is sufficient to constitute an attempt? An attempt may be said to be the doing of any of the acts which must be done in succession before

the desired object can be accomplished ; or rather, with the limitation that the attempt must be an act directly approximating to the commission of the offence. Thus procuring a die for coining was held an act in furtherance of the criminal purpose sufficiently proximate to the offence (*y*) ; but not so the buying a box of matches for setting a stack of corn on fire (*z*). But the act must have been such that, if no interruption had taken place, the principal offence would have been successfully committed ; so that if a person puts his hand into a pocket with intent to steal what is there, and the pocket is empty, he cannot be convicted of an attempt to steal (*a*).

Every attempt to commit a crime is itself an indictable misdemeanor at common law. In some cases, it is specially provided that it shall amount to a felony, *e.g.*, attempt to murder (*b*).

If on the trial of a person charged with felony or misdemeanor, the jury do not think that the offence was completed, but, nevertheless, are of the opinion that an attempt was made, they may express this in their verdict. The prisoner is then dealt with as if he had been convicted on an indictment for the attempt. But of course he is not liable to be prosecuted afterwards for the attempt (*c*).

Verdict of attempt on indictment for the complete crime.

As a rule, attempts are punished less severely than the corresponding consummate crimes, though the mischief may be as great in the one case as the other. It is with a view to cases in which the complete offence is

Punishment of attempts.

(*y*) *R. v. Roberts*, 25 L. J. (M.C.) 17.

(*z*) *R. v. Taylor*, 1 F. & F. 511.

(*a*) *R. v. Collins*, 33 L. J. (M.C.) 177.

(*b*) 24 & 25 Vict. c. 100, ss. 11-15.

(*c*) 14 & 15 Vict. c. 100, s. 9.

more mischievous that the distinction is made, so as to give the person a *locus pœnitentiæ* before the consummation. It may be noticed that this consummation is prevented sometimes by the penitence of the party, sometimes by extrinsic causes (*d*).

(*d*) Austin, 1098.

CHAPTER IV.

PERSONS CAPABLE OF COMMITTING CRIMES.

EVERY man must be presumed to be responsible for his acts until the contrary is clearly shewn. If an act ordinarily falling within the scope of the criminal law be committed, the law presumes that it was done wilfully and with malicious intent. Therefore it lies on the accused to rebut this presumption.

Exemptions
from criminal
responsibility.

There are certain exemptions from criminal responsibility, or rather, under certain circumstances, acts which would otherwise be criminal, on some special ground are not deemed so. The foregoing examination of the essential elements of crime enables us to determine what is the nature of these exemptions; inasmuch as they are founded, as a rule, on the absence of one of those essentials. In one or two instances, however, other considerations, either of policy or well-advised lenity, are entertained, *e.g.*, in the case of crimes committed by ambassadors.

The several instances of irresponsibility may be reduced to the following classes:—

Classification
of exemptions.

1. Absence of criminal intention or malice, including:—

Insanity: Infancy: Ignorance (mistake).

2. Absence of will, *i.e.*, the act is purely involuntary:—

Misfortune, &c.: Physical compulsion.

3. Instant and well-grounded fear, stronger than the fear naturally inspired by the law (e):—

Fear of excessive unlawful harm. Coercion of married women.

In each of these cases (1-3) the fear of punishment is not calculated to act upon the person so as to deter him, or to deter others by making him an example; therefore the punishment would be inoperative and worse than useless.

4. When an act, under ordinary circumstances criminal, is denuded of that character, inasmuch as it is directly authorised by the law:—

In pursuance of legal duty; *e.g.*, the sheriff hanging a criminal.

In pursuance of legal right; *e.g.*, slaying in self-defence.

Here, as in the first class, there is no criminal intention.

Each of these grounds of exemption must now be dealt with.

1a. *Insanity.* *Insanity.*—With regard to no subject in criminal law is there so much obscurity and uncertainty as on the question of the responsibility or irresponsibility of a prisoner when the state of his mind at the time of the commission of the act is the point at issue. It has often been asserted, and not without a considerable degree of truth, that the acquittal or conviction of a prisoner, when insanity is alleged, is more or less a matter of chance. The subject is one on which the views taken by medical men differ most widely from those taken by lawyers; and as the former

are generally the most important witnesses in cases of alleged insanity, the confusion is by no means diminished (*f*).

Two classes of mental alienation are usually recognized:— Idiocy and insanity.

1. *Dementia naturalis*, or *a nativitate*—in other words, *idiocy*, or continuous weakness of mind from birth, without lucid intervals: a person deaf and dumb from birth is by presumption of law an idiot, but it may be shewn that he has the use of his understanding.

2. *Dementia accidentalis*, or *adventitia*—usually termed *insanity*, in the narrower signification. The mind is not naturally wanting or weak, but is deranged from some cause or other. It is either *partial* (insanity upon one or more subjects, the party being sane upon all others) or *total*. It is also either *permanent* (usually termed *madness*) or *temporary* (the object of it being afflicted with his disorder at certain periods only, with lucid intervals), which is usually denominated *lunacy* (*g*).

Three stages in the history of the law of insanity may be discerned. The first, outrageous as it was, may be illustrated by the following dictum of an English judge:—A man who is to be exempted from punishment “must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast (*h*).” History of the law of insanity. The second stage regarded as the test

(*f*) “There is great difference of opinion as to the cause of the uncertainty: the lawyers asserting that it is owing to the fanciful theories of medical men, who never fail to find insanity when they earnestly look for it, the latter protesting that it is owing to the unjust and absurd criterion of responsibility which is sanctioned by the law.”—Maudsley’s *Responsibility in Mental Disease* (1874), 101.

(*g*) v. *Bac. Abr. Idiots*. As to *dementia affectata*, or drunkenness, v. p. 25.

(*h*) *R. v. Arnold*, 16 St. Tr. 764.

of responsibility the power of distinguishing right from wrong in the abstract (*i*). The third stage, unhappily, is that in which we live; though common sense may soon inaugurate a fourth. The existing state of doctrines dates from the trial of M'Naughten in the year 1843 (*j*).

M'Naughten's Case.

Certain questions were propounded by the House of Lords to the judges. The substance of their answers was to the following effect:—"To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong" (*k*). Thus the question of knowledge of right or wrong, instead of being put generally and indefinitely, is put in reference to the *particular act at the particular time* of committing it.

Partial insanity.

As to *partial* insanity, that is, when a person is sane on all matters except one or more, the judges declared that "he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punish-

(*i*) *R. v. Bellingham*, Coll. 636.

(*j*) 10 Cl. & Fin. 200; 1 C. & K. 130.

(*k*) Cf. Alison's Principles of Criminal Law of Scotland, pp. 645, 654. "The insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, as applied to the act in question, and of the knowledge that he was doing wrong in committing it."

ment" (l). After laying down, as above, what may be called the "particular right and wrong theory," they abandon it here, and also in another answer, where, still dealing with partial delusions, they express their opinion that "notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time of committing such crime that he was acting contrary to the law of the land" (m).

It has been held that an apparent absence of motive for the deed is not any ground for inferring an irresistible and insane impulse; and that though there be an irresistible impulse, if there be no real delusion as to any fact, it affords no defence (n). Why a man should be punished for what he cannot resist, it is, perhaps, hard to comprehend (o).

Absence of
motive, and
irresistible
impulses.

(l) "Here is an unhesitating assumption that a man, having an insane delusion, has the power to think and act in regard to it *reasonably*; that, at the time of the offence, he ought to have and exercise the knowledge and self-control which a sane man would have and exercise, were the facts with respect to which the delusion exists real; that he is, in fact, bound to be reasonable in his unreason, sane in his insanity."—Maudsley, 97.

(m) For strictures on these principles of "exquisite inhumanity," see remarks of Judge Ladd in *State v. Jones*, 50 New Hampshire Reports, 369.

(n) *R. v. Haynes*, 1 F. & F. 666. *R. v. Barton*, 3 Cox, 275.

(o) It may be interesting to notice how succinctly the proposed Criminal Code of 1880 dealt with this question of insanity:—

"No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind, to such an extent as to render such person incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong.

"A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity under the provisions hereinafter contained unless the delusions caused him to believe in the existence of some state of things which if it existed would justify or excuse his act or omission. Insanity before or after the time when he committed or omitted the act, and insane delusions though only partial, may be evidence that the offender was at the time, when he committed or omitted the act, in such a condition of mind as to render him irresponsible for such act or omission.

"Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved."

Evidence of
medical wit-
nesses.

As to *medical* evidence on the question of insanity—a witness of medical skill may be asked whether, assuming certain facts, proved by other witnesses, to be true, they, in this opinion, indicate insanity. But he cannot be asked, although present in Court during the whole trial, whether from the evidence he has heard he is of opinion that the prisoner, at the time he committed the alleged act, was of unsound mind; for such a question, unlike the previous one, involves the determination of the truth of the evidence, which it is for the jury to determine (*p*).

Trial, when
insanity is
pleaded.

The law presumes sanity: and, therefore, the burden of the proof of insanity lies on the defence. Even in the case of an acknowledged lunatic, the offence is presumed to have been committed in a lucid interval, unless the contrary be shewn. It is for the petty jury to decide whether a case of insanity, recognized as such by the law, has been made out. The grand jury have no right to ignore a bill on the ground of insanity. The jury are obliged to attend to the directions of the judge as to what is called the law on the subject, but which is rather an erroneous opinion as to a matter of fact. There seems to be no sound reason for withdrawing any part of the question of insanity from the jury—a thing which is done when the artificial test of responsibility is propounded to them (*q*). When, on the part of the defence, the insanity of the prisoner at the time of the commission of the offence is given in evidence, and the jury acquit him, they must find specially whether he was insane at the time of the commission of the offence, and declare whether they acquit him on that ground. If they so

(*p*) *R. v. Frances*, 4 Cox, 57. See also *M'Naughten's Case*.

(*q*) "If the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness, and showing himself qualified to testify as an expert."—Judge Doe in *State v. Pike*, 49 New Hamp. Rep. 399.

acquit him on the ground of insanity, the court will order him to be kept in proper custody till the Queen's pleasure be known; and the Queen may order the confinement of such person during her pleasure (*r*). So if a person indicted is insane, and upon arraignment is found insane by a jury impanelled to discover his state of mind, so that he cannot be tried; or if on his trial, or when brought up to be discharged for want of prosecution, he appears to the jury to be insane, the court may record such finding, and order him to be kept in custody till the Queen's pleasure be known (*s*).

In accordance with the dictates of humanity no criminal proceedings can be taken against a man while he is *non compos mentis*. Thus, if a man commit murder and become insane before arraignment, he cannot be arraigned; if after trial before judgment, judgment cannot be pronounced; if after judgment before execution, execution will be stayed (*t*).

Drunkenness.—Drunkenness is sometimes termed *dementia affectata*—acquired madness. A state of voluntary intoxication is not any excuse for crime (*u*). It is true that the sanctions of the law cannot be supposed to exert an equal influence on the mind and conduct of a person in this state; but the initiation of the crime may be said to date back to the time when the offender took steps to deprive himself of his reason. It is evident that if drunkenness were allowed to excuse, the gravest crimes might be committed with impunity by those who either counterfeited the state or actually assumed it.

It would be incorrect to say that the consideration When to be considered.

(*r*) 39 & 40 Geo. 3, c. 94, s. 1; 3 & 4 Vict. c. 54, s. 3.

(*s*) 39 & 40 Geo. 3, c. 94, s. 2.

(*t*) 1 Hale, P. C. 34.

(*u*) *v. Pearson's Case*, 2 Lew. C. C. 144.

of drunkenness is never entertained in the criminal law. Though it is no excuse for crime, yet it is sometimes an index of the quality of an act. Thus, it may be taken into account by the jury when considering the motive or intent of a person acting under its influence; for example, on the question whether a person who struck a blow was excited by passion or acted from ill-will; whether expressions used by the prisoner were uttered with a deliberate purpose, or were merely the idle expressions of a drunken man (*x*). So M. could not have *intended* suicide if she were so drunk that she did not know what she was doing (*y*).

Of course if the drunkenness be involuntary, as for example, if it be by the contrivance of the prisoner's enemies, he will not be accountable for his action while under that influence. Also, if drunkenness has become habitual and confirmed, so as to produce the disease of insanity, this insanity, equally with other kinds of mental disease, may be pleaded in defence.

1b. Infancy, as
an excuse for
crime.

Infancy.—Infancy can be used in defence only as evidence of the absence of criminal intention, though there are certain presumptions of the law on the subject, some of which may, some of which may not, be rebutted.

The age of discretion, and therefore of responsibility, varies according to the nature of the crime. What the law technically terms "infancy" does not terminate till the age of twenty-one is reached; but this is not the "infancy" which is the criterion in the criminal law. Two other ages have been fixed as points with reference to which the criminality of an act is to be considered.

(*x*) *R. v. Thomas*, 7 C. & P. 817.

(*y*) *R. v. Moore*, 3 C. & K. 319.

Under the age of *seven*, an infant cannot be con- First period.
victed of a felony; for until he reaches that age he is
presumed to be *doli incapax*; and this presumption
cannot be rebutted by the clearest evidence of a mis-
chievous discretion (z).

Between *seven* and *fourteen*, he is still, *prima facie*, Second period.
deemed by law to be *doli incapax*; but this presump-
tion may be rebutted by clear and strong evidence of
such mischievous discretion (a), the principle of the
law being *malitia supplet aetatem*. Thus, a boy of the
age of ten years was hanged for killing his companion;
he having manifested a consciousness of guilt, and a
discretion to discern between good and evil, by hiding
the body (b). There is one exception to this rule,
grounded on presumed physical reasons. A boy under
the age of fourteen cannot be convicted of rape or
similar offences, even though he has arrived at the
full state of puberty. He may, however, be convicted
as principal in the second degree.

Between *fourteen* and *twenty-one*, an infant is pre- Third period.
sumed to be *doli capax*, and accordingly, as a rule, may
be convicted of any crime, felony or misdemeanor.
But this rule is subject to exceptions, notably in the
case of offences consisting of mere non-feasance; as, for
example, negligently permitting felons to escape, not
repairing highways, &c. It is given as a reason for
the exemption in cases of the latter character that, not
having the command of his fortune till twenty-one, the
person wants the capacity to do those things which the
law requires (c).

Though, as we have seen, infants who have arrived Juvenile
offenders.

(z) *A presumption juris et de jure*, v. p. 435.

(a) *A presumption juris*, v. p. 435.

(b) 1 Hale, P. C. 26, 27; v. *York's Case*, Fost. 70.

(c) 4 Bl. 22.

at years of discretion are not to be allowed to commit crimes with impunity, we shall find that in certain cases the law deals with juvenile offenders in an exceptional way, in order, if possible, to prevent their becoming confirmed criminals (*d*).

1c. Ignorance,
as an excuse
for crime.
Ignorance of
law.

Ignorance (including mistake).—Two kinds of ignorance must be distinguished—Ignorance of Law—Ignorance of Fact. It is a leading principle of English law that ignorance of law in itself will never excuse. Though it is implied in some of the excuses of which we have treated, *e.g.*, infancy, the ignorance of the law is not the ground of exemption (*e*). It is no defence for a foreigner charged with a crime committed in England that he did not know he was doing wrong, the act not being an offence in his own country (*f*).

Ignorance of
fact.

Ignorance or mistake of fact will or will not excuse, according as the original intention was or was not lawful. For example, if a man, intending to kill a burglar in his house, kill his servant, he will not be guilty of an offence. But if intending to do grievous bodily harm to A., he, in the dark, kill B., he will be guilty of murder.

The cases we have been noticing are those in which the exemption from the normal liability is grounded on the absence of criminal intention or malice. Those in which the ground of exemption is absence of will, or, in other words, involuntary acts, require very little consideration.

2a. Accident,
&c., as an
excuse for
crime.

Accident (including misfortune, mishap, &c.)—To be valid as an excuse, the accident must have happened in the performance of a lawful act with due caution.

(*d*) v. p. 482.

(*e*) v. Austin, 496.

(*f*) *R. v. Esop*, 7 C. & P. 456.

For example, A., properly pursuing his work as a slater, lets fall a slate on B.'s head ; B. dies in consequence of the injury. Here A. will not be liable ; but it would have been otherwise had he at the time been engaged in some criminal act ; or if he had not exercised proper skill or care. We shall find cases of this description most frequently in drawing the line between culpable and excusable homicide.

Physical Compulsion—As if A. kills B. with C.'s ^{ab. Physical} hand. ^{compulsion.}

The third division comprises cases where the act is done under a fear stronger than that which the law inspires.

Fear of Excessive and Unlawful Harm.—When a ^{3a. Duress per} person is driven to commit an offence by such threats ^{minas.} and menaces of personal violence from others as induce a well-grounded apprehension of present death or grievous bodily harm, in some cases he is excused. The danger must threaten his person ; it will not be sufficient if it only endangers his property. And this plea of *duress per minas* will not be of avail in every crime. Thus, though a man be violently assaulted, and has no other possible means of escaping death but by killing an innocent person, if he commit the act he will be guilty of murder ; for he ought rather to die himself than escape by the murder of an innocent man. But in such case he may kill his assailant (g). Questions of this sort are especially likely to occur when persons are compelled to join in a rebellion or riot (h).

State of Married Women.—In cases of *felony*, if a ^{3b. Married} married woman commits the crime in the presence of ^{women, when} not respon- ^{sible.}

(g) 1 Hale, P. C. 51.

(h) *R. v. M'Growther*, Fost. 13 ; 9 St. Tr. 566.

her husband, the law presumes that she acts under his coercion, and therefore excuses her from punishment. But this exemption is not allowed in all felonies, though it seems unsettled where the line is drawn. It appears that the wife is liable in treason, murder, manslaughter, and robbery (*i*). In no case is she excused if her husband be not present, not even if the act be done by his order (*k*). The presumption of law may be rebutted by evidence. Thus, if it can be shewn that she acted voluntarily, at least if she took a principal part in the commission of the crime, she will be convicted, although her husband were present (*l*).

In cases of *misdemeanor*, the prevailing opinion seems to have been that the wife is responsible for her acts, although her husband be present at the commission. However, in recent cases, this has been doubted, and the rule prevailing in felony applied (*m*). At any rate, the exemption does not extend to those offences relating to domestic matters and the government of the house, in which the wife may be supposed to have a principal share, as for keeping a disorderly or gaming-house.

It requires the co-operation of two, at least, to constitute a conspiracy. Of this crime, therefore, a husband and wife cannot by themselves be convicted, inasmuch as in the eye of the law they are regarded as one person. So a wife cannot be convicted of stealing her husband's goods; nor of harbouring him when he has committed a crime.

No other
relation an
excuse.

This relation of wife to the husband is the only one

(i) *R. v. Manning*, 2 C. & K. 903; *R. v. Oruse*, 8 C. & P. 541; 1 Hale, P. C. 45-48; 1 Hawk. c. i. s. 11; 1 Russ. 139; Starkie on Evidence, tit. Husband and Wife.

(k) *R. v. Morris*, R. & R. 270.

(l) *R. v. Torpey*, 12 Cox, 45.

(m) *R. v. Price*, 8 C. & P. 19; *R. v. Torpey*, *supra*.

which the law recognises as a shield from criminal punishment. The other private relations, parent and child, master and servant, will not excuse nor extenuate the commission of any crime; either child or servant being liable notwithstanding the command or coercion of the parent or master.

Certain exceptional cases, where the ordinary rules as to capability of committing crime do not entirely prevail, require a brief notice.

The Sovereign.—The sovereign can do no wrong: The sovereign and crime. therefore he is not amenable to the ordinary criminal courts of his kingdom. Blackstone forbids us even to imagine such delinquency on the part of the sovereign. "He is not under the coercive power of the law; which will not suppose him capable of committing a folly, much less a crime. We are, therefore, out of reverence and decency, to forbear any idle inquiries of what would be the consequence if the king were to act thus and thus; since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do anything inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance" (n). Inasmuch as it is presumed that he can do no wrong, although he commands an unlawful act to be done, *e.g.*, an unlawful arrest, the instrument is not indemnified, but is punishable.

Corporations.—Even corporations aggregate, such as Corporations and crime. railway companies, may be indicted by their corporate names for breaches of duty; whether such breaches consist of wrongful acts, *e.g.*, obstructing highways; or wrongful omissions, *e.g.*, neglecting to repair bridges (o). A corporation may also be indicted by

(n) 4 Bl. 33.

(o) *R. v. Birmingham and Gloucester Railway Co.*, 9 C. & P. 469; 2 Q. B. 47.

its corporate name and fined for an assault committed or a libel published by its order (*p*).

Aliens and crime.

Aliens.—Foreigners who commit crimes in England are punishable exactly as if they were natural-born subjects. It is no defence on behalf of a foreigner that he did not know he was doing wrong, the act not being an offence in his own country. Though this is no defence, it may mitigate the punishment (*q*).

Ambassadors and crime.

Ambassadors.—Different views, materially conflicting with each other, have been held as to the criminal liability of ambassadors and their suites. Some writers maintain that for no offence, whether it be against the life, person, or property of an individual, is an ambassador amenable to the criminal law of the country to which he is sent (*r*). Others assert that though he is not punishable for crimes made such by the laws of the particular country; he is so for any great crimes which must be such in any system. Or, as it is sometimes expressed, he is punishable for *mala in se*, but not for acts which are merely *mala quia prohibita*. Thus, an ambassador might be convicted for murder or rape, but not for smuggling. The more probable and reasonable course seems to be to request the recall of the offender by his own state, with or without an expression of opinion that the offender should be punished in his own country. If this be refused, the ambassador might be dismissed, and pressure brought to bear on the other state to induce the latter to put him on his trial.

There is one class of offences which stands on a different footing, namely, offences affecting the existence and safety of the state. For a direct attempt against the life of the sovereign, it is said that the offender

(*p*) *Eastern Counties Co. v. Broom*, 6 Exch. 314.

(*q*) *R. v. Esop*, 7 C. & P. 456.

(*r*) Phillimore's *International Law*, vol. ii. part vi. c. 7.

would be directly punishable by the state (s). But, at any rate, in this and other offences against the government, the state might demand the punishment of the offender by the foreign state; and if this demand were not complied with might treat him as a public enemy, and demand satisfaction from that foreign state. The matter would then pass from the province of law to that of politics.

(s) 1 Hale, P. C. 96-99; Fost. 187, 188.

CHAPTER V.

PRINCIPALS AND ACCESSORIES.

Principals and accessories in felonies. THOSE who are implicated in the commission of crimes are either *Principals* or *Accessories*. This distinction is based on the consideration whether the party was present or absent at the commission. It is recognised in felonies alone.

Principals (*i.e.*, those present) are either

Principals in the first degree, or Principals in the second degree.

Accessories are either

Accessories before the fact, or Accessories after the fact.

Of these in their order:—

What constitutes a principal in the first degree ;

Principal in the first degree.—He who is the actor or actual perpetrator of the deed. It is not necessary that he should be actually present when the offence is consummated ; thus, one who lays poison or a trap for another is a principal in the first degree. Nor need the deed be done by the principal's own hands ; for it will suffice if it is done through an innocent agent, as, for instance, if one incites a child or a madman to murder.

In the second degree.

Principal in the second degree.—One who is present,

aiding and abetting at the commission of the deed (†). This presence need not be actual; it may be constructive. That is, it will suffice if the party has the intention of giving assistance, and is sufficiently near to give the assistance; as when one is watching outside, while others are committing a felony inside, the house. There must be both a participation in the act and a community of purpose (which must be an unlawful one) at the time of the commission of the crime. So that, as to the first point, mere presence or mere neglect to endeavour to prevent a felony will not make a man a principal: as to the second, acts done by one of the party, but not in pursuance of the arrangement, will not render the others liable.

The distinction between principals of the first and of the second degree is not a practically material one, inasmuch as the punishment of offenders of either class is generally the same.

Accessories are those who are not (a) the chief actors in the offence, nor (b) present at its performance, but are some way concerned therein, either before or after the fact committed (u).

Accessory before the fact.—One who, being absent at the time when the felony is committed, yet procures, counsels, commands, or abets another to commit a felony (x). This may be done not only by direct command or counsel, but also by expressing assent or approbation of the felonious design of another. But the bare concealment of a felony about to be committed does not make an accessory. It is not necessary

What constitutes an accessory before the fact.

(†) Principals in the second degree are frequently termed *aiders and abettors*; sometimes also *accomplices*. The latter term, however, may include all *participes criminis*.

(u) 4 Bl. 35.

(x) 1 Hale, P. C. 615.

that there should be any direct communication between the accused and the principal; as if A. requests B. to procure the services of C. in order to murder D.

What such accessory is answerable for.

The accessory will be answerable for all that ensues upon the execution of the unlawful act commanded, at least for all probable consequences; as, for instance, if A. commands B. to beat C., and he beats him so that he die, A. is accessory to the murder. But if the principal intentionally commits a crime essentially different from that commanded, the person commanding will not be answerable as accessory for what he did not command. Thus, if A. commands B. to break into C.'s house, and B. sets fire to the house, A. cannot be convicted of the arson. But a mere difference in the mode of effecting the deed, or in some other collateral matter, will not divest the commander of the character of accessory if the felony is the same in substance. Thus, if A. commands B. to kill C. by poison, and he kills him with a sword, A.'s command suffices to make him an accessory.

Accessories before the fact in manslaughter.

With regard to manslaughter—As a rule the offence is sudden and unpremeditated, and this view of the nature of the crime having been taken, it has been said that there can be no accessory before the fact in manslaughter. But in many cases there is deliberation, though it is not accompanied by an intention to take away life. It is easy to present a case in which there may be an accessory before the fact to manslaughter. A. counsels B. to mischievously give C. a dose of medicine merely to make him sick, and C. dies in consequence; A. is guilty as an accessory before the fact to the manslaughter (y).

Trial of accessories before the fact.

As to the trial of those who command, counsel, or procure the commission of a felony.—Until a recent

(y) *R. v. Gaylor*, 7 Cox, 253.

date it was the rule that such a person could not be tried without his own consent, except at the same time with the principal, or after the principal had been tried and found guilty. He was merely an accessory, and therefore he could not be tried before the fact of the crime was established. Now two courses are open to the prosecution; either (a) to proceed, as formerly, against the person who counsels, &c., as an accessory before the fact with the principal felon, or after his conviction; or (b) to indict the counsellor for a substantive felony (for to that his offence is declared by the statute to amount), and this may be done whether the principal has or has not been convicted, and although he is not amenable to justice. The punishment in either case is the same. If one of these two modes has been adopted, of course the offender cannot be afterwards prosecuted in the other (z). It is also provided that an accessory before the fact may be indicted, tried, convicted, and punished in all respects as if he were a principal felon (a). To convict of the substantive felony under this Act, it is still necessary to prove that the principal deed has actually been committed. Soliciting and inciting to the commission, if the deed is not committed, is only a misdemeanor.

Accessory after the fact.—One who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon (b). What is required to make a person an accessory after the fact? (a) There must have been some felony committed and completed; (b) the party charged must have had notice, direct or implied, at the time he assists, &c., the felon, that he had committed a felony; (c) he must have done some act to assist the felon personally. It will suffice if there has been any assistance given in order to hinder the felon's apprehension, trial, or punishment; for example,

What constitutes an accessory after the fact.

(z) 24 & 25 Vict. c. 94, s. 2.

(a) Ibid. s. 1.

(b) 1 Hale, P. C. 618.

concealing him in the house, supplying him with horse or money to facilitate his escape. But merely suffering the principal to escape will not make the party an accessory after the fact (c).

Receivers,
how tried.

Receiving stolen goods, knowing them to have been stolen, is generally treated as a separate offence; the receiver being convicted of a felony, misdemeanor, or summary offence, according as the stealing of the property is a felony, misdemeanor, or offence punishable on summary conviction (d). If, however, the stealing, obtaining, &c, is a felony, the receiver may be indicted either as an accessory after the fact, or for a substantive felony (e).

Wife not an
accessory after
the fact.

We have noticed (f) that, as a rule, the wife is protected from criminal liability for acts committed in the presence of her husband. Much more, then, can she claim this immunity when the offence with which she is charged is that of receiving and assisting her husband. There is no exemption in respect of any other relation. Even the husband may be convicted for assisting his wife.

Accessory after
the fact, how
tried.

An accessory after the fact to a felony may be tried in the same manner as an accessory before the fact; that is, either as an accessory with the principal, or after his conviction, or as for a substantive felony, independently of the principal (g). But where an indictment contains two counts, the first charging the accused person as principal in a felony, the second charging him as accessory after the fact to the same felony, the prosecution must elect upon which count they will proceed (h).

(c) 1 Hale, P. C. 618, &c.; *R. v. Chapple*, 9 C. & P. 355.

(d) v. p. 230.

(e) 24 & 25 Vict. c. 96, s. 91.

(f) v. p. 29.

(g) 24 & 25 Vict. c. 94, s. 3.

(h) *R. v. Brannon*, 14 Cox, 394.

He is, in general, punishable with imprisonment for any term not exceeding two years (with or without hard labour), and may also be required to find security for keeping the peace, or, in default, to suffer additional imprisonment for a period not exceeding one year (i). But an accessory after the fact to murder may receive sentence of penal servitude for life, or for any less term to five years, or imprisonment not exceeding two years (j). A receiver of stolen goods is liable to a maximum punishment of penal servitude for fourteen years (k).

It has been observed that the distinction of principals and accessories is found only in the case of felonies.

As to *treason*—Both every kind of incitement which in a felony would make a man an accessory before the fact, and every kind of assistance which would make him an accessory after the fact, in treason will make the offender a principal traitor. This rule is said to exist *propter odium delicti*. In treason, all are principals.

As to *misdemeanors*—Those who aid or counsel the commission of the crime are dealt with as principals (l); those who merely assist after the misdemeanor has been committed are not punishable, unless indeed the act amount to the misdemeanor of rescue, obstructing the officer, or the like (m). In misdemeanors, no accessories.

The following outline of the present state of the law on the subject of degrees of guilt may serve to place the matter in a clearer light:— Recapitulation.

(i) 24 & 25 Vict. c. 94, s. 4.

(j) 24 & 25 Vict. c. 100, s. 67; 27 & 28 Vict. c. 47, s. 2.

(k) 24 & 25 Vict. c. 96, s. 91.

(l) 24 & 25 Vict. c. 94, s. 8.

(m) *R. v. Greenwood*, 21 L. J. (M.C.) 127.

There are no accessories in treason or misdemeanors, only in felonies.

Principals, whether of the first or second degree, are virtually dealt with in the same way.

Accessories, whether before or after the fact, may be treated as such, or as charged with a substantive felony; but if once tried in either of these capacities, the other may not be afterwards resorted to.

Accessories before the fact receive the same punishment as principals; accessories after the fact generally imprisonment not exceeding two years.

In the following imaginary case examples of each of the four kinds of participation in a crime will be found. A. incites B. and C. to murder a person. B. enters the house and cuts the man's throat, while C. waits outside to give warning in case any one should approach. B. and C. flee to D., who, knowing that the murder has been completed, lends horses to facilitate their escape. Here B. is principal in the first degree, C. in the second degree, A. is accessory before the fact, D. after the fact.

BOOK II.

CLEARLY it will be advisable to adopt some logical plan in treating of the various offences which come under the cognizance of tribunals of criminal jurisdiction. Though, of course, crimes which primarily affect the state or the public also affect the individuals who constitute that state or public ; and crimes which in their immediate effect wrong individuals indirectly are productive of public evil, yet the division of crimes into *Offences of a Public Nature* and *Offences of a Private Nature* or *against Individuals*, may be resorted to without fear of confusion. There are other possible modes of arrangement ; for example, according to the different tribunals before which, or the different processes by which, the crimes are prosecuted (as in the French Penal Code), according to the punishments with which the crimes are visited, &c. Plan of the book.

Taking as the main division that indicated above, the general order will be determined, as far as possible, by the wideness of the province of the various crimes, thus commencing with offences against the law of nations. For the present no notice other than that which is merely incidental will be taken of offences which are merely punishable on summary conviction. A special chapter will be devoted to this subject.

PART I.

OFFENCES OF A PUBLIC NATURE.

CHAPTER I.

OFFENCES AGAINST THE LAW OF NATIONS.

What offences
are punishable
under the law
of nations.

CERTAIN offences are regarded as violating those unwritten laws which are admitted by nations in general, and which it is their duty to have enforced. It must not be assumed that any state is at liberty to take upon itself the punishment of an offence against the law of nations, if such offence is committed within the territories of a foreign jurisdiction. The most that it can do in such case is to demand that justice be done by the foreign state: and if such state implicates itself in the offence by neglecting to proceed against the offender, then to put on pressure to enforce its requirements. But the case is otherwise if the offence is committed in parts which are considered extra-territorial, such as the high seas. In these all nations equally have an interest, and will proceed against individuals who are there guilty of offences against the law of nations.

PIRACY.

The term includes both the common law offence, and also certain offences which have been provided against by particular statutes.

Piracy at Common Law (a).—The offence consists in

(a) v. Phillimore, vol. i. part iii. c. 20.

committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there (*b*). Each state is entitled to visit the crime with the penalties which its own laws may determine (*c*). In England, formerly the proper courts for the trial of piracy were the Admiralty Courts; but later, the trial was by commissioners nominated by the Lord Chancellor, in whose number were always found some common law judges (*d*). Now, the judges sitting at the Central Criminal Court and at the assizes are empowered to try cases of piracy (*e*).

Piracy at common law—what it is.

Where tried.

The robbery must be proved as in ordinary cases of that crime committed on land. The taking must be without authority from any prince or state, for a nation cannot be deemed guilty of piracy. If the subjects of the same state commit robbery upon each other it is piracy. If the injurer and the injured be of different states the nature of the act will depend on the relation of those states. If in amity it is piracy; if at enmity it is not, for it is a general rule that enemies can never commit piracy on each other, their depredations being mere acts of hostility (*f*).

Essentials of the crime.

The gist of the offence is the place where it is com-

(*b*) 1 Russ. 253. v. *Trial of Joseph Dawson and others*, 13 Howell's State Trials (1696), 456.

(*c*) v. Manning's Law of Nations, by Amos, 121. The crime has been thus defined by text writers on international law: "The offence of depredating on the seas without being authorized by any sovereign state, or with commissions from different sovereigns at war with each other" (Lawrence's Wheaton's Elements of International Law, 1863, p. 246). The definition is framed to exclude depredations by lawfully authorized privateers, &c.

(*d*) 28 Hen. 8, c. 15; v. p. 294.

(*e*) 4 & 5 Wm. 4, c. 36, s. 22; 7 & 8 Vict. c. 2, s. 1.

(*f*) v. *In re Tivnan*, 5 B. & S. 645; 2 Sir L. Jenk. 790; 1 Sir L. Jenk. xciv.

It should be remembered that the Declaration of Paris (1856) contained a provision that privateering should be abolished, binding on the countries parties to that declaration—Russia, Turkey, England, France, Italy, Austria, and Prussia.

mitted, viz., the high seas, and within the jurisdiction of the Admiralty (*g*).

Acts made
piracy by
statute.

Piracy by Statute.—By particular statutes certain acts are made piracy. Such are the following:—

For any natural-born subject to commit an act of hostility upon the high seas against another of Her Majesty's subjects under colour of a commission from a foreign power (*h*), or, in time of war, to assist an enemy on the sea (*i*).

For any commander, master of a ship, or any seaman or marine, to run away with the ship or cargo, or to yield them up voluntarily to any pirate; or to consult or endeavour to corrupt any such person to the commission of such acts; or to bring any seducing message from any pirate, enemy, or rebel; or to put force upon the commander so that he cannot fight; or to make, or endeavour to make, a revolt in the ship (*k*).

For any person to have dealings with, or render any assistance to, a pirate (*l*).

For any person to board a merchant ship and throw overboard or destroy any of the ship's goods (*m*).

Punishment
of piracy.

The punishment for piracy was formerly death. Now the offender is liable to penal servitude to the extent of life, or to imprisonment not exceeding three years. But piracy accompanied with an assault with intent to murder, or with wounding or endangering the life of any person on board of, or belonging to, the vessel, is still punishable with death (*n*).

(*g*) As to the jurisdiction of the Admiralty, v. Archbold's Crim. Cases, 466, and *post*, p. 305.

(*h*) 11 & 12 Wm. 3, c. 7, s. 8, made perpetual by 6 Geo. 1, c. 19.

(*i*) 18 Geo. 2, c. 30.

(*k*) 11 & 12 Wm. 3, c. 7, s. 9.

(*l*) 8 Geo. 1, c. 24, s. 1, perpetual by 2 Geo. 2, c. 28.

(*m*) Ibid.

(*n*) 7 Wm. 4 & 1 Vict. c. 88, ss. 2, 3.

OFFENCES AS TO SLAVES.

This class of offences is connected with the last, Slave trade. inasmuch as the first and chief crime which we shall notice is declared to be piracy, felony, and robbery—viz., for any British subject, or person within British territory, to convey away, or assist in conveying away, any person on the high seas as slaves, or ship them for such purpose (*o*). The punishment formerly was death, but now it is penal servitude to the extent of life, or imprisonment not exceeding three years (*p*).

Dealing in slaves and certain other offences are made felonies. And it is a misdemeanor for a seaman to serve on board a ship engaged in the slave trade (*q*).

A recent statute consolidates the law on the subject of trading in slaves; but it preserves the provisions noticed above (*r*).

• It will not be necessary to discuss any of the more obscure offences against the law of nations (*s*).

(*o*) 5 Geo. 4, c. 113, s. 9.

(*p*) 7 Wm. 4 & 1 Vict. c. 91, s. 1.

(*q*) 5 Geo. 4, c. 113, ss. 10, 11.

(*r*) 36 & 37 Vict. c. 88. v. *R. v. Zulusta*, 1 C. & K. 215.

(*s*) As to the Violation of Safe Conducts and Passports, v. 4 St. Bl. 217. Violation of the Rights of Ambassadors, 4 St. Bl. 219; 1 Russ. 960.

CHAPTER II.

OFFENCES AGAINST THE GOVERNMENT AND SOVEREIGN.

WE now have to deal with offences committed by members of the community in violation of their duties as subjects; these offences for the most part also incidentally causing injury to individuals. The full treatment which the gravity of this class of crimes would demand is happily in many cases rendered unnecessary by the rarity of their occurrence. This is especially true of the crime of treason.

TREASON (*t*).

Moral view
of treason.

The ordinary popular conception of treason, or, what is the same thing, the offence of a traitor, is something of this sort, "armed resistance, justified on principle, to the established law of the land" (*u*). This is the most favourable view of the offence, the notion of "principle" obscuring its gravity. But the true conception of the crime includes acts which will be admitted on all hands to be highly morally heinous, far removed from justifiable and conscientious efforts for revolution.

(*t*) Treason against the government was termed "*high*" treason to distinguish it from "*petit*" treason, which consisted in the murder of a superior by an inferior in natural, civil, or spiritual relation; "and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance of private and domestic faith, are denominated *petit* treason" (4 Bl. 75). But every offence which would previously have amounted to *petit* treason is now regarded simply as murder (9 Geo. 4, c. 31, s. 2), therefore there is no longer any reason for distinguishing the graver offence by the epithet "*high*."

(*u*) Fitz. St. 36.

The crime comprises the three following classes of acts (x):—

Classification
of treasonable
acts.

“1. Execution or contrivance of acts of violence against the person of the sovereign.

2. Acts of treachery against the state in favour of a foreign enemy.

3. Acts of violence against the internal government of the country.”

In addition to these branches, the law includes a few acts which are of the rarest occurrence, and at the present day hardly demand any notice.

In order to ascertain what constitutes treason, it will be necessary to glance at the early history of the crime. For a long period there was great vagueness and uncertainty as to what acts were treasonable, the consequence being that any deed which appeared to infringe the royal rights or to interfere with the royal authority was constructed into treason, though it lacked the essentials of that crime. Thus we are told (y) that unlawfully taking the royal venison, fish, or goods, had the effect of making the taker a traitor. To remedy this evil, and to provide certainty in a matter of so great moment, an Act was passed in the reign of Edward III. (z). It will be well to give the actual words of the statute, and then to consider individually the offences with which it deals.

History of
the law of
treason.

Treason is committed “when a man doth compass or imagine the death of our lord the king, or of our lady

(x) Fitz. St. 113.

(y) Mirror, c. i. s. 4.

(z) 25 Edw. 3, st. 5, c. 2. “This statute is memorable, not only on account of its vast direct importance at many periods of our history, but also because it is almost the only instance which the statute-book affords of a statutory definition of a crime laid down in such a manner as to supersede the whole common law or unwritten doctrine on the subject.” —Fitz. St. 36.

his queen, or of their eldest son and heir; or if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving them aid or comfort in our realm or elsewhere, and therefore be probably (or proveably, '*probablement*') attainted of open deed by people of their condition." So much for the political or quasi-political offences provided against; the statute proceeds to define certain other acts of treason: "And if a man counterfeit the king's great or privy seal, or his money; and if a man bring false money into this realm, counterfeit to the money of England, as the money called Lushburg, or other like to the said money of England, knowing the money to be false, to merchandize or make payment, in deceit of our said lord the king and his people; and if a man slea the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine being in their places, doing their offices." It is also provided that the judges shall not give judgment in any case which is supposed to be treason till it has been determined by the king and parliament whether it ought to be treason or felony.

Change in the
gist of the
crime.

As he glances through the Acts here enumerated, the reader will not fail to notice that treason was regarded as an offence rather against the person of the king than against the state. But in later times, with an altered state of circumstances, when the person of the king comparatively had been lost sight of in the consideration of the interests of the public, though the letter of the old law was preserved, by liberal construction it had been adapted to the new state of affairs. For example, levying war against the king was construed to include almost any act which was calculated to tend towards the subverting of the constitution.

(a.) *Compassing or imagining the death of the king, 25 Edw. 3. queen, or eldest son and heir.*—Here the “king” is to be understood to mean the king *de facto*, though he be not the king *de jure*. On the other hand, the person rightfully entitled to the crown, if not in possession, is not within the statute. The “queen” referred to is the queen consort, the queen regnant being included in the term “king.” But against the husband of the queen regnant treason cannot be committed.

It is the designing that constitutes the offence. But this design must be evidenced by some overt act, so that if there be wanting either the design, as in the case of killing the king by accident, or the overt act, as when the design has been formed, but laid aside before being put into execution, there is no treason.

What will constitute an overt act? Anything wil- Overt act.
fully done or attempted by which the sovereign’s life may be endangered; for example, conspirators meeting to consult on the means of killing the sovereign (a), or of usurping the powers of government (b); writings, if published, importing a compassing of the sovereign’s death, and even words advising what would be an overt act will suffice as evidence of the design; but not so loose words which have no reference to any designed act (c).

(b.) *Violating the king’s wife, the king’s eldest daughter 25 Edw. 3. unmarried, or the wife of the king’s eldest son and heir.*—By “violating” of course carnal knowledge is to be understood. The act is not divested of its treasonable character by the fact that the woman consents. In such a case both parties are guilty of treason. It has been said that the reason for making the violation of

(a) *R. v. Vane*, Kel. 15.

(b) *R. v. Hardy*, 1 East, P. C. 60.

(c) *v. R. v. Gordon*, Doug. 593.

these particular persons treason, was to guard the blood-royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious (*d*). But obviously this explanation is not supported by all the instances chosen.

25 Edw. 3.
What constitutes a levying war.

(c.) *Levying War against the Sovereign*.—To constitute a levying there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature (*e*). But there need not be actual fighting: nor is the number of persons taking part in the movement material.

Levying, direct or constructive.

The levying is either *direct* or *constructive*. It is direct "when the war is levied directly against the Queen or her forces, with intent to do some injury to her person, to imprison her, or the like" (*f*); for example, a rebellion to depose her, delivering up the sovereign's castle to the enemy. Constructive treason is of a very different character, the end of the movement being rather the purification of the government than its overthrow. It is committed for the purpose of effecting innovations of a public and general nature by an armed force. Thus it is treason to attempt by force to alter the religion of the state, or to obtain the repeal of its laws. So it is treason to throw down *all* enclosures, open *all* prisons; but not if the attempt be to break down a particular enclosure, or deliver a particular person from prison, because in these latter cases the design is particular and not general (*g*).

25 Edw. 3.

(d.) *Adhering to the Sovereign's enemies*.—As in the three former cases, this offence must be evidenced by some overt act, for example, to raise troops for the enemy, or to send them money, arms, or intelligence.

(d) 3 Inst. 9.

(e) *R. v. Frost*, 9 C. & P. 129.

(f) 1 Hale, P. C. 131, 132.

(g) *R. v. Dammarce*, 8 St. Tr. 218.

By the "sovereign's enemies" are meant the subjects of foreign powers with which he is at war. It appears, therefore, that a British subject, though in open rebellion, can never be deemed an enemy of the sovereign, so as to make assistance rendered to him treason within this branch of the statute (*h*).

(e.) *Slaying the Chancellor, &c.*—It will be observed ^{25 Edw. 3.} that the statute applies only to the actual killing, not a mere attempt: to those judges only when actually acting in that capacity, and not at other times, and not to barons of the exchequer.

Counterfeiting the great or privy seal is no longer ^{Acts no longer} treason, but simple felony (*i*). It will be treated of ^{treason.} under the title "Forgery" (*j*). So, also, coining offences are not now treason (*k*).

Thus was the common law of treason declared by the statute of Edward III. This statute, with certain qualifications, is still in force; in certain cases new statutes specially declaring that their provisions shall not affect anything contained in the statute (*l*).

Subsequently, from time to time, parliament made ^{Subsequent additions to the number of treasonable acts.} other offences treason—notably several in the reign of Henry VIII., in the matter of religion. It also took upon itself the authority to declare certain acts, after they had been committed, to be treason (thus trespassing into the province of the judge (*m*)); as, for example, stealing cattle by Welshmen. All these new treasons, however, were abrogated in the reign of Edward VI. and Mary. Then, again, the statute of Edward III. was restored to its place as the standard of

(*h*) 1 Hale, P. C. 159; 3 Inst. 11.

(*i*) 24 & 25 Vict. c. 98, s. 1.

(*j*) v. p. 262.

(*k*) 24 & 25 Vict. c. 99, *passim*. v. p. 64.

(*l*) v. 11 & 12 Vict. c. 12, s. 6.

(*m*) Fitz. St. 36.

treason ; but additions to the number of treasonable offences have since been made by the legislature. The following still remain :—

i. Endeavouring (to be evidenced by some overt act) to prevent the person entitled under the Act of Settlement from succeeding to the crown (*n*).

ii. Maliciously, advisedly, and directly, by writing or printing, maintaining that any other person has any right or title to the crown, otherwise than according to the Act of Settlement, or that the sovereign with the authority of parliament may not make laws and statutes to bind the crown and descent thereof (*o*).

iii. Compassing, imagining, inventing, devising, or intending death or destruction, or any harm tending to death or destruction, maim or wounding, imprisonment, or restraint of the person of the sovereign (*p*).

Procedure in prosecutions for treason.

There are some points in connection with the procedure in prosecutions for treason, which may be noticed here more conveniently than in the second part.

Limitation as to time.

In the first place, no prosecution for treason can take place after three years from the commission of the offence, if it be committed within the realm, unless the treason consist of a designed assassination of the sovereign (*q*).

Copy of indictment, &c.

The prisoner indicted for treason (or misprision of treason) is entitled to have delivered to him, ten days before the trial, a copy of the indictment, and a list of the witnesses to be called, and of the petty jurors, to

(*n*) 1 Anne, st. 2, c. 17, s. 3.

(*o*) 6 Anne, c. 7.

(*p*) 36 Geo. 3, c. 7, s. 1, confirmed by 57 Geo. 3, c. 6, s. 1. The former statute also denominated certain other acts treason ; but all these offences, with the exception of those against the person of the sovereign noticed above, were converted into felonies by 11 & 12 Vict. c. 12, s. 1.

v. Treason-Felony, p. 55.

(*q*) 7 & 8 Wm. 3, c. 3.

enable him the better to make his defence (*r*). But the provision does not apply to cases of treason in compassing and imagining the death of the sovereign (or misprision of such treason) where the overt act is an act against the life or person of the sovereign. In such cases the prisoner is indicted, arraigned, and tried in the same manner and upon like evidence as if he stood charged with murder, though, if he is found guilty, the consequences are those of treason (*s*).

One overt act is sufficient to prove the treason, but any number may be mentioned in the indictment. To this overt act, or else to it and another of the same treason, there must be two witnesses, unless the accused confesses willingly (*t*). Overt act.

The prisoner may make his defence by counsel, not more than two, to be named by him, and assigned by the court or judge. He has the exceptional privilege of addressing the jury, notwithstanding that his counsel have delivered their speeches (*u*). Prisoner's defence.

Formerly the punishment for treason was of a most barbarous character. Males were drawn on a hurdle to the place of execution, and hanged, and cut down while alive; afterwards they were disembowelled, the head was severed from the body, the body quartered, and the quarters placed at the disposal of the sovereign. By a wholesome statute, this proceeding was deprived of its more outrageous features, it being provided that beheading might be substituted by the sovereign, or the capital sentence might be altogether remitted (*x*). By the same Act the punishment of females, formerly burning alive, was changed to hanging. Now, by the Punishment for treason.

(*r*) 7 Anne, c. 21, s. 11; 6 Geo. 4, c. 50, s. 62.

(*s*) 39 & 40 Geo. 3, c. 93; 5 & 6 Vict. c. 51, s. 1.

(*t*) 7 & 8 Wm. 3, c. 3, ss. 2, 4; except in cases tried, as above, as for murder.

(*u*) *R. v. Collins*, 5 C. & P. 305.

(*x*) 54 Geo. 3, c. 146.

Felony Act, 1870 (*y*), the only part of the sentence which is retained in any case is the hanging.

Certain additional consequences of conviction and attainder (*z*), viz., forfeiture of lands and goods, and corruption of blood, were abolished by the statute just mentioned (*a*), but certain incapacities were at the same time attached to convictions for treason or felony (*b*).

MISPRISION OF TREASON.

Concealment
of treason.

Misprision of treason consists in the bare knowledge and concealment of treason, any degree of assent making the party a principal. At common law this mere concealment, being construed as aiding and abetting, was regarded as treason, inasmuch as, it will be remembered, there is no distinction into principals and accessories in treason (*c*). It was specially enacted that a bare concealment of treason should be held a misprision only (*d*). The only punishment now is imprisonment. The party knowing of any treason must, as soon as possible, reveal it to some judge of assize, or justice of the peace.

ATTEMPTS TO ALARM OR INJURE THE QUEEN.

Acts tending
to alarm the
Queen.

It will be remembered that at the beginning of the reign of Her Majesty a morbid desire for notoriety induced certain youths to annoy her by discharging fire-arms at her person, or in her presence. To put an end to this the legislature provided that deeds of this kind should be regarded as high misdemeanors (*e*). The acts enumerated are—To discharge, point, aim, or

(*y*) 33 & 34 Vict. c. 23, s. 31.

(*z*) *N.B.*—A man is convicted when found guilty; he was said to be attainted when judgment had been given.

(*a*) 33 & 34 Vict. c. 23, s. 1.

(*b*) v. p. 465.

(*c*) v. p. 39.

(*d*) 1 & 2 Phil. & Mary, c. 10.

(*e*) 5 & 6 Vict. c. 51.

present at the person of the Queen any gun or other arms, whether containing any explosive or destructive material or not; to discharge any explosive substance near her; to strike or throw anything at her with intent to injure or alarm her, or break the public peace; or in her presence to produce any arms or destructive matter with like intent. The punishment is penal servitude to the extent of seven years, or imprisonment not exceeding three years. To this, very appropriately, the court may add that the offender be whipped, publicly or privately, once, twice, or thrice during the term of imprisonment.

TREASON-FELONY, *or* FELONIOUS COMPASSING TO LEVY
WAR, ETC.

Certain offences which had been declared treason by statute (*f*) were, by a later statute (*g*), made felonies. To these, on account of their treasonable character, the name "treason-felony" is sometimes given. The acts enumerated are—compassing, &c., to deprive or depose the sovereign from the style, honour, or name of the crown of the United Kingdom, or other of her dominions; (b) to levy war against the sovereign within the United Kingdom, in order by force or constraint to compel her to change her measures or councils, or to put force or constraint upon, or intimidate or overcome both houses, or either House of Parliament; (c) to move or to stir any foreigner or stranger with force to invade the United Kingdom, or any other of the sovereign's dominions.

This compassing, &c., must be evidenced by some overt act, or by something published in printing or writing (*h*). Though the facts alleged in the indict-

(*f*) 36 Geo. 3, c. 7, s. 1.

(*g*) 11 & 12 Vict. c. 12, s. 3.

(*h*) A third mode was mentioned—by open and advised speaking. But prosecutions for the prohibited practice, if they were expressed merely in this manner, were not to be had beyond two years from the passing of the Act (1848-1850), s. 4.

Felonious compassing to depose, levy war, induce invasion.

ment, or pursued on the trial of any person indicted under this Act for felony, amount to treason, the person is not by reason thereof entitled to be acquitted of such felony; but if tried for the felony he cannot afterwards be prosecuted for treason upon the same facts (i). The punishment may extend to penal servitude for life.

SEDITION.

Sedition, what it consists in.

Sedition is a comprehensive term, embracing all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the state, and lead ignorant persons to endeavour to subvert the government and the laws of the empire. The objects generally are to excite discontent or dissatisfaction, to stir up opposition to the government, and to bring the administration of justice into contempt (j).

This description is somewhat vague; but in that respect it only resembles the offence itself. It is hard to lay down any decisive line, on one side of which acts are seditious, and on the other innocent. The term "sedition" is commonly used in connection with words written or spoken. It includes, however, many other acts, some of which are treated of separately; for example, training to arms, unlawful secret societies or meetings, &c.

Seditious libels or words.

What is sufficient to constitute seditious libels or words? It may be answered generally—such political writings or words as do not amount to treason (k), but which are not innocent. We have already seen what constitute treason. As to what are innocent: it is the right of a free subject to criticise and censure freely the conduct of the servants of the Crown, whether ministerial or judicial, and the acts of the government

(i) 11 & 12 Vict. c. 12, s. 7.

(j) *R. v. Sullivan*, *R. v. Pigott*, 11 Cox, 44, 45.

(k) Though treason itself may be said to be a kind of sedition.

and proceedings in courts of justice, so long as he does it not with malignity nor imputes corrupt or malicious motives (*l*). The test proposed by an eminent authority is the following: "Has the communication a plain tendency to produce public mischief by perverting the mind of the subject and creating a general dissatisfaction towards government" (*m*).

Proving the truth of a seditious libel is no excuse for the publishing it; nor will it extenuate the punishment, inasmuch as the statute (*n*), which allows the defendant charged with libel to plead the truth under certain conditions, does not apply to seditious libels (*o*). Truth of seditious libel no extenuation.

The punishment for seditious libels or words is fine and imprisonment. Punishable in the same way are slanderous words uttered to a magistrate.

UNLAWFUL OATHS AND SOCIETIES.

Oaths.—At the end of the last century, in consequence of sedition and mutiny having been promoted by persons banding themselves together under the obligation of an oath, an Act was passed to make criminally punishable those who took oaths of a certain character:—Any person administering or causing to be administered, or aiding in or being present at and consenting to such administering, any oath or engagement intended to bind any person to engage in any mutinous or seditious purpose; or to disturb the peace; or to be of any society formed for such purpose; or to obey the orders of a committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose; or not to inform and give evidence against any associate or other person; or not to dis- Unlawful oaths.

(*l*) *R. v. Sullivan, &c., supra.*

(*m*) v. 3 Russ. 201.

(*n*) 6 & 7 Vict. c. 96, s. 6.

(*o*) *R. v. Duffy*, 2 Cox, 45; *R. v. Burdett*, 4 B. & Ald. 95.

cover an unlawful combination, or illegal act, or illegal oath or engagement—is guilty of felony. The punishment is penal servitude from five to seven years. The same consequences also attend *taking* such an oath when not compelled to (*p*). It will be observed that this statute is not confined to oaths administered for seditious and mutinous purposes, but applies to other unlawful combinations, *e.g.*, to raise wages (*q*).

A later statute (*r*) declares to be felony the taking part in administering any oath intended to bind a person to commit any treason, or murder, or any felony punishable with death. The punishment for such offence is penal servitude to the extent of life, or imprisonment not exceeding three years. The punishment for taking such an oath is penal servitude for the same term (*s*).

Oaths taken by
compulsion.

Persons taking these oaths by *compulsion* are not excused on that account unless they disclose the circumstance to a justice of the peace, one of the secretaries of state, or the privy council, within, under the first statute, four days; under the second statute, fourteen days (*t*). The oath need not be in any precise form so long as the parties understood it to have the force and obligation of an oath; therefore, of course, it is not necessary that it should be taken on the Bible (*u*).

Unlawful
societies.

Societies.—Societies are deemed unlawful combinations if their members are required to take any oath or engagement which is unlawful under the two above-mentioned statutes of George III., or is not required or authorized by law, or of which the mem-

(*p*) 37 Geo. 3, c. 123, s. 1.

(*q*) *R. v. Marks*, 3 East, 157.

(*r*) 52 Geo. 3, c. 104, s. 1.

(*s*) 7 Wm. 4 & 1 Vict. c. 91, s. 1.

(*t*) s. 2 of each statute.

(*u*) *R. v. Lovelass*, 6 C. & P. 596.

bers subscribe any unauthorized test or declaration. Also societies the names of whose members or officers are kept secret; or which, consisting of different branches, elect committees or delegates to communicate with other societies (*v*). Exceptions are made in favour of societies for religious and charitable purposes and freemasons' lodges; also as to declarations approved of by two justices and registered according to the provisions of the Act.

Proceedings may be taken against persons connected with such societies, either by way of summary conviction before justices, or by indictment. In the latter case penal servitude to the extent of seven years may be awarded. The proceedings must be commenced in the name of the law officers of the Crown.

OFFENCES AGAINST THE FOREIGN ENLISTMENT ACT.

The object of this statute (*x*) is to regulate the conduct of Her Majesty's subjects during the existence of hostilities between foreign states with which Her Majesty is at peace. The necessity for some regulations is obvious. Were English subjects allowed to interfere as they thought proper in foreign wars, the state would inevitably be involved in misunderstandings with the foreign powers.

Foreign Enlistment Act, 1870.

Two classes of criminal acts are dealt with:—

Illegal enlistment. Illegal ship-building and expeditions.

Illegal Enlistment.—Doing any of the following acts without the sovereign's licence is prohibited: (a) Enlisting, or inducing any other person to enlist, in the

Offences connected with illegal enlistment.

(*v*) 39 Geo. 3, c. 79; 57 Geo. 3, c. 19; 9 & 10 Vict. c. 33.
 (*x*) 33 & 34 Vict. c. 90, repealing 59 Geo. 3, c. 69.

service of a foreign state at war with a friendly state; (b) leaving Her Majesty's dominions (or inducing, &c.) with intent to serve such foreign state; (c) embarking persons under false representations in order that they may be led to enter into such service; (d) the master or owner of a ship taking illegally enlisted persons on board ship. In each case the offender may be punished by fine, or imprisonment not exceeding two years, or both. And in the case of illegally taking on board, the ship is detained until satisfaction is given; and illegally enlisted persons are put on shore and not allowed to return to the ship (y).

Illegally building, equipping, &c., ships.

Illegal Shipbuilding, &c.—Building, (b) commissioning, (c) equipping, or (d) despatching a ship, knowing or having reasonable cause to believe (the burden of proof lying on the builder that it is not illegal) that the ship is to be employed in the service of such a state, if done without licence, is punishable in the same way, and the ship and her equipments are forfeited to the Queen. If the contract for building the ship has been made before the beginning of the war, the builder or equipper is not punishable if he gives due notice to the Secretary of State, and insures that the ship will not be despatched until the termination of the war without the licence of the Queen (z).

Other illegal acts.

Augmenting, without licence, the warlike force of a ship in such service by adding to the number of guns, &c., is punishable in the same way (a). So, also, fitting out without licence a naval or military expedition against a friendly state, with the additional consequence that the ships, arms, &c., are forfeited (b).

Trial.

The offender may be tried within the jurisdiction

(y) 33 & 34 Vict. c. 90, ss. 4-7.

(z) Ibid. ss. 8, 9.

(a) Ibid. s. 10.

(b) Ibid. s. 11.

where the offence was committed, or where the offender may be (c).

A judge of a superior court in the United Kingdom, or elsewhere of the highest British court of criminal jurisdiction, may order the trial to be had at any place, the removal to which may be conducive to the interests of justice (d). If thought proper, proceedings may be taken contemporaneously against the offender and against the ship for forfeiture (e).

DESERTION, MUTINY, AND INCITING THERETO.

Any person who maliciously endeavours to seduce a person serving in Her Majesty's sea or land forces from his duty or allegiance, or incites him to any mutiny or mutinous practice, is guilty of felony. It is punishable with penal servitude to the extent of life, or imprisonment not exceeding three years. The trial may be had at the assizes for any county in England (f).

The above is the provision for punishment in the ordinary criminal courts. The proceedings and punishments of courts martial are regulated by the Army Discipline and Regulation Act, 1879 (g), which comes into force and remains in force for the period named in an annual Act, passed for the purpose (h). That Act makes any person who procures or persuades a soldier to desert, or knowingly aids, or assists, or conceals a soldier in deserting, liable on summary conviction to six months' imprisonment with or without hard labour (i). The deserter himself is punishable with death if on, or under orders for, active service: or if otherwise, with

Inciting to
desertion or
mutiny.

Desertion, &c.,
punished
under the
Army Disci-
pline and Regu-
lation Act.

(c) 33 & 34 Vict. c. 90, s. 17.

(d) Ibid. s. 18.

(e) Ibid. s. 20.

(f) 37 Geo. 3, c. 70, perpetual by 57 Geo. 3, c. 7. v. 7 Wm. 4 & 1 Vict. c. 91, s. 1.

(g) 42 & 43 Vict. c. 33.

(h) v. 43 Vict. c. 9.

(i) 42 & 43 Vict. c. 33, s. 146.

Naval Discipline Act.

imprisonment or penal servitude (*j*). The Naval Discipline Act (1866) (*k*) provides for the punishment by court martial of mutiny and other offences committed by persons subject to that Act; mutiny with violence being made punishable with death. Punishments are also set forth for those who endeavour to seduce those subject to the Act from their allegiance (*l*).

ILLEGAL TRAINING AND DRILLING.

Illegal training and drilling.

Meetings for the purpose of training or drilling to the use of arms without authority from the sovereign, or the lieutenant, or two justices of the peace of the county, are illegal. Any person who is present for the purpose of training or assisting in training is guilty of a misdemeanor, and is liable to penal servitude to the extent of seven years. If he is present for the purpose of being himself trained, he is punishable with fine and imprisonment not exceeding two years. The prosecution must be commenced within six months after the offence committed. Any magistrate, constable, or peace officer may disperse such meetings, and arrest and detain any person present (*m*).

UNLAWFUL DEALINGS WITH PUBLIC STORES.

Offences relating to the public stores.

The law on this subject is consolidated by the Public Stores Act, 1875 (*n*). Certain marks are appropriated by the government for the distinguishing of naval stores; certain dealings with these marks are criminal. If any one without lawful authority, which he must prove, applies any of these marks in or on any such stores, he is guilty of a misdemeanor, and may be imprisoned for a term not exceeding two years (*o*). If

(*j*) 42 & 43 Vict. c. 33, s. 12.

(*k*) 29 & 30 Vict. c. 109, s. 10.

(*l*) See next page for general remarks as to the punishment of offences by those in the army or navy.

(*m*) 60 Geo. 3 & 1 Geo. 4, c. 1, ss. 1, 2.

(*n*) 38 & 39 Vict. c. 25.

(*o*) Ibid, s. 4.

any one, with intent to conceal Her Majesty's property in such stores, obliterates these marks, wholly or in part, he is guilty of felony, and is punishable with penal servitude to the extent of seven years (*p*). The unlawful possession of public stores is punishable on summary conviction (*q*).

It is also an offence punishable on summary conviction to buy or receive from a soldier arms, ammunition, regimental clothing, &c.; or to be found in possession of such articles without being able to account satisfactorily for such possession. It is to be observed that the person charged with such an offence, or the wife or husband of such person, may be sworn as a witness (*r*).

APPENDIX.

OFFENCES BY MEMBERS OF THE ARMY AND NAVY.

It will be convenient here to see on what footing the army and navy are with regard to proceedings and punishment for crime. Offences in the
army and
navy.

As to the *army*.—It is provided by the Army Discipline Act, 1879, that every officer or private who shall incite or join any mutiny, or knowing of it shall not give notice to the commanding officer, or shall desert, or enlist in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use insolence to his superior officer, or disobey his lawful commands, shall suffer death or such other punishment as the court martial may inflict. Other offences are set forth and their punishments prescribed. The court martial may sentence any officer or soldier to death, penal servitude, Army Disci-
pline Act.

(*p*) 38 & 39 Vict. c. 25, s. 5.

(*q*) *Ibid.* ss. 7-11.

(*r*) 42 & 43 Vict. c. 33, s. 149.

imprisonment, forfeiture of pay or pension, or any other punishment which shall accord with the usage of the service. No person acquitted or convicted by a civil magistrate or by a jury is to be tried by court martial for the same offence.

Soldiers not exempt from ordinary criminal proceedings.

The Act does not, however, exempt soldiers from being punishable by the ordinary criminal courts. It expressly provides that nothing therein is to be construed to extend to exempt any officer or soldier from being proceeded against by the ordinary courts of law, when accused of felony or misdemeanor, or of any offence other than absenting himself from service or misconduct respecting his contract (s). And if a person who has been sentenced for an offence by a court martial is afterwards tried by a civil court for the same offence, that court in awarding punishment shall have regard to the military punishment he may have already undergone.

Naval Discipline Act.

As to the *navy*.—The Naval Discipline Act (1866) (t) makes similar provisions for the navy as to courts martial, the trial of offences, no exemption from ordinary criminal jurisdiction, &c.

COINAGE OFFENCES.

Certain coinage offences formerly treason.

So decidedly were offences relating to the coin regarded as offences against the government, inasmuch as they not only infringed the royal prerogative, but also were calculated to make the public faith suspected, that in the statute of Edward III. two of them were declared treason, viz., (a) the actual counterfeiting the gold and silver coin of the realm, and (b) the importing such counterfeit money with intent to utter it,

(s) 42 & 43 Vict. c. 33, ss. 138, 155.

(t) 29 & 30 Vict. c. 109.

knowing it to be false (*u*). These offences were, however, made felonies by a later statute (*v*).

It may be noticed that at least one class of coinage offences, viz., uttering counterfeit money, might be dealt with as a particular case of obtaining goods or money by false pretences (*w*).

The law on the subject under consideration has been consolidated by a recent statute (*x*). It will be our task to present its matter under several heads.

A. Counterfeiting Coin.—A distinction is made as to Counterfeit-
the kind of coin. Whosoever falsely makes or counter-
feits any coin resembling, or apparently intended to
resemble or pass for

i. The current gold or silver coin of this realm, commonly called the Queen's money (*y*),

ii. Foreign gold or silver coin (*z*),

iii. The Queen's current copper coin (*a*),
is guilty of felony, and is punishable, in the case of gold and silver coin of the realm, with penal servitude to the extent of life; in the other cases, to the extent of seven years.

Counterfeiting

iv. Foreign coin other than gold or silver coin is a misdemeanor, punishable for the first offence with imprisonment not exceeding one year; for the second offence with penal servitude to the extent of seven years (*b*).

(*u*) v. p. 48.

(*v*) 2 Wm. 4, c. 34.

(*w*) Fitz. St. 141.

(*x*) 24 & 25 Vict. c. 99. In the present division the quoting of a section must be understood to refer to this Act.

(*y*) s. 2.

(*z*) s. 18.

(*a*) s. 14.

(*b*) s. 22.

The offence is complete although the false coin has not been finished, or is not in a fit state to be uttered (c); much less is any attempt to utter necessary. Any one, not necessarily an officer from the Mint, may at the trial prove the falseness (d). In this offence is included that committed by persons lawfully engaged in coining, who make the coin lighter or of baser alloy. The counterfeiting can generally only be proved by circumstantial evidence; for example, by proof of finding coining tools in working order, and pieces of the money, some in a finished, some in an unfinished state.

Colouring. *B. Colouring Coin.*—Colouring, washing, &c., counterfeit coin, or any piece of metal with intent to make it pass for gold or silver coin; or colouring, filing, or otherwise altering genuine coin with intent to make it pass for coin of a higher degree, is a felony punishable with penal servitude to the extent of life (e).

Impairing. *C. Impairing, &c., Gold and Silver Coin.*—Impairing, diminishing, or lightening any of the Queen's gold or silver coin, with the intent that it shall pass for gold or silver coin, is felony, punishable with penal servitude to the extent of fourteen years (f).

Having in possession any filings, clippings, dust, &c., obtained by the above-mentioned process, is a felony, the limit of penal servitude for which is seven years (g).

Defacing. *D. Defacing Coin.*—Defacing the Queen's gold, silver, or copper coin, by stamping thereon any names or words, although the coin be not thereby lightened, is a misdemeanor, punishable with imprisonment not exceeding

(c) s. 30.

(d) s. 29.

(e) s. 3.

(f) s. 4.

(g) s. 5.

one year (*h*). It should be added that coin so defaced is not legal tender; and by the permission of the Attorney-General or Lord Advocate, any person who tenders or puts off coin so defaced may be brought before two magistrates, and on conviction be fined not exceeding forty shillings (*i*).

E. Buying or Selling, &c., Counterfeit Coin at lower value.—Any person without lawful authority or excuse (the proof whereof lies on the accused), buying, selling, receiving, or putting off any counterfeit coin for a lower rate or value than it imports, is guilty of felony. If the counterfeit be of gold or silver the extent of penal servitude is life (*j*); if copper, the limit is seven years (*k*). Dealing in counterfeit coin under its value.

F. Importing and Exporting Counterfeit Coin.—Im- Importing.
porting or receiving into the United Kingdom from beyond the seas, without lawful authority, &c., counterfeit gold or silver coin, knowing the same to be false and counterfeit, is a felony, punishable with penal servitude to the extent of life (*l*). It is said that importing the coin from the Queen's dominions beyond the seas does not fall within this section, because the counterfeiting there is punishable by the laws of England (*m*). Importing foreign counterfeit coin is a felony, the limit of the penal servitude for which is seven years (*n*).

Exporting, or putting on board any vessel for the Exporting.
purpose of being exported from the United Kingdom any coin counterfeit of the Queen's current coin, with-

(*h*) s. 16.
(*i*) s. 17.
(*j*) s. 6.
(*k*) s. 14.
(*l*) s. 7.
(*m*) v. Arch. 811.
(*n*) s. 19.

out lawful authority, &c., is a misdemeanor punishable with imprisonment not exceeding two years (o.)

Uttering.

G. *Uttering Counterfeit Coin*.—Tendering, uttering, or putting off counterfeit gold or silver coin, knowing the same to be false and counterfeit, is a misdemeanor punishable with imprisonment not exceeding one year (p). If at the time of uttering the offender has any other counterfeit coin in his possession, or if he within ten days utters another coin, knowing it to be counterfeit, the punishment may extend to two years (q). If the uttering is after a previous conviction for either of these offences, or for having in possession three or more pieces of counterfeit, or for any felony relating to the coin, the utterer is guilty of felony, and may be sentenced to penal servitude for life (r).

Uttering counterfeit coin meant to resemble a foreign gold or silver coin, is punishable for the first offence with imprisonment not exceeding six months; for the second not exceeding two years. The third offence is a felony punishable with penal servitude to the extent of life (s).

Uttering spurious coin, *e.g.*, foreign coin, medals, pieces of metal, &c., as current gold or silver coin, with intent to defraud, is a misdemeanor punishable with imprisonment to the extent of one year (t).

Having in possession.

H. *Having Counterfeit Coin in Possession*.—Having three or more counterfeit gold or silver coins in possession, knowing them to be counterfeit, and intending to utter or put off them, or any of them, is a misdemeanor

(o) s. 8.

(p) s. 9.

(q) s. 10.

(r) s. 12.

(s) ss. 20, 21.

(t) s. 13.

punishable with penal servitude limited to five years (*u*). If after previous conviction for either of the misdemeanors mentioned in sects. 9 and 10, or any felony relating to the coin, the crime is a felony, and may be punished with penal servitude to the extent of life (*v*). If the coin is the Queen's copper coin the limit of the punishment is imprisonment for one year (*w*). Having in possession without lawful excuse more than five pieces of foreign counterfeit coin renders the possessor liable to a penalty on conviction before a justice (*x*).

I. *Making, &c., Coining Tools*.—Knowingly and without lawful authority, &c., making or mending, buying or selling, or having in custody or possession any coining instrument or apparatus adapted and intended to make any gold or silver coin or foreign coin, is a felony punishable with penal servitude for life (*y*). If the instruments, &c., are designed for coining the Queen's copper coin, the limit of the penal servitude is seven years (*z*).

Making, &c.,
tools.

Conveying out of the Mint, without lawful authority, &c., any coining instrument, or any coin, bullion, metal, or mixture of metals, is a felony punishable with penal servitude for life (*a*).

If in any case coin is suspected to be diminished or counterfeited, it may be cut, bent, &c., by any person to whom it is tendered; the loss to fall on the deliverer if the coin is found to be counterfeit or unreasonably diminished; on the person to whom tendered, if found correct (*b*). Provision is also made for the seizure by

Trial whether
coin is
diminished or
counterfeit.

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- (*u*) s. 11.
 - (*v*) s. 12.
 - (*w*) s. 15.
 - (*x*) s. 23.
 - (*y*) s. 24.
 - (*z*) s. 14.
 - (*a*) s. 25.
 - (*b*) s. 26.

any one finding them of counterfeit coin or tools ; for the search for the same ; and for their ultimate delivery to the officers of the Mint or other persons duly authorized to receive them (c).

CONCEALMENT OF TREASURE TROVE.

Treasure trove. Treasure trove, that is, treasure found hid *in* (not *upon*) the earth, belongs to the sovereign or his grantees. The offence of concealing it was formerly punishable by death ; now by fine and imprisonment (d).

Other offences against the government and sovereign. A variety of other offences affecting the sovereign and government, and thence called *contempts* or *high misdemeanors*, might be noticed, but it will suffice here merely to mention them, referring for a fuller notice to Blackstone's Commentaries. Contempts against the sovereign's title, as the denial of his right to the crown ; against his person and government, as drinking to the pious memory of a traitor ; against his prerogative, as by disobeying his lawful commands ; against his palaces or courts of justice, as by fighting in either ; maladministration of high offices ; embezzling the public money ; selling public offices. These are generally punishable by fine and imprisonment, but are rarely made the subject of indictment, unless they fall within the province of some other crime.

Præmunire. The subject of *Præmunire* may also be dismissed very summarily. The offence originally consisted in introducing a foreign power into the land, through obeying papal bulls and processes. The punishment for this was considered something terrible, the offender being put out of the king's laws and protection, his lands and goods forfeited, and himself imprisoned during the king's pleasure. These penalties of præmunire were

(c) s. 27.

(d) *R. v. Thomas*, 33 L. J. (M.C.) 22.

afterwards by different statutes applied to other great offences, some having no connection with the original crime, for example, to restrain the importation or making of gunpowder (e). But, some of the statutes having become obsolete and others having been repealed, prosecutions of this nature are never now heard of. The reader will find a discursive treatment of the subject in Blackstone, or his modern editors (f).

(e) 16 Car. 1, c. 21.

(f) 4 Bl. 103; 4 St. Bl. 181.

CHAPTER III.

OFFENCES AGAINST RELIGION.

Grounds on
which the
state punishes
offences
against
religion.

ON what grounds does the state arrogate to itself the right of punishing offences against Religion? Certainly not as the minister of God. The state has observed that certain acts or courses of conduct, which are forbidden by religion, are also productive of disorder and mischief to the community. It has therefore provided for the punishment of those that offend, not in consequence of the breach of the law of God, but as the result of the breach of the law of the country. That the state does not consider itself under an obligation to enforce the law of morality, as such, is obvious from the fact that mere lying and other acts of immorality are not within the pale of the criminal law. This violation of human law is the true ground of interference, though in some of the offences we shall notice it is impossible to shut our eyes to the fact that in early times the legislators did to some extent consider themselves authorized to punish mere irreligion.

APOSTACY—BLASPHEMY.

Apostacy.

Apostacy, or the total *renunciation* of Christianity, was for a long period punished by the ecclesiastical courts only, at one time the punishment they awarded being death. Later, however, the civil power thought it necessary to interfere, "by not admitting those miscreants to the privilege of society who maintained such principles as destroyed all moral obligations" (g)

It was provided that if any one *educated in, or having made profession of*, the Christian religion, by writing, printing, teaching, or advised speaking, maintains that there are more Gods than one, or denies the Christian religion to be true, or the Holy Scripture to be of divine authority, for the second offence, besides being incapable of bringing an action, or being guardian, executor, legatee, or grantee, must suffer imprisonment for three years without bail (*h*). There shall be no prosecution for such words spoken, unless information of such words be given on oath before a justice within four days after they are spoken, and the prosecution be within three months after such information (*i*). The offender is to be discharged, if, within four months after his first conviction, he renounces his error (*j*).

Blasphemy is also punishable at common law by fine ^{Blasphemy.} and imprisonment. Christianity, as it is said, is a part of the law of England, and a gross outrage against it is to be punished by the state. The offences include not only the blasphemous libels by one who has been attached to the Christian religion and has apostatized, as to which we have seen particular provisions have been made, but also denying, whether orally or by writing, the being or providence of the Almighty, contumelious reproaches of our Lord and Saviour Christ, profane scoffing at the Holy Scriptures, or exposing any part thereof to contempt or ridicule (*k*). The libel, to be blasphemous, must consist not in an honest denial of the truths of the Christian religion, but in a wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects (*l*). But the disputes of learned men upon

(*h*) 9 & 10 Wm. 3, c. 32, s. 1; in the Revised Statutes, c. 35.

(*i*) Ibid. s. 2.

(*j*) Ibid. s. 3.

(*k*) v. 3 Russ. 193.

(*l*) *Reg. v. Ramsay*, 48 L. T. N. S. 73.

particular points of religion are not punished as blasphemy (*m*). It remains merely to add that the law is rarely put in force, and then only because the libel is of a most extravagant nature.

DISTURBING PUBLIC WORSHIP.

Offences
relating to
public wor-
ship.

Any person wilfully and maliciously or contemptuously disturbing any lawful meeting of persons assembled for public worship, or molesting the person officiating or any of those assembled, upon proof by two or more credible witnesses before a magistrate, must answer for such offence at the sessions, and upon conviction is fined forty pounds (*n*). Riotous, violent, or indecent behaviour is also punishable on summary conviction (*o*).

WITCHCRAFT, SORCERY, ETC.

Witchcraft,
&c.

Punishment (generally death) for these supposed evil practices belonged to a state of society different from ours. It is only about a century and a half, however, since an Act was passed to the effect that prosecutions for such practices should cease; at the same time making punishable by imprisonment persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in any occult or crafty science (*p*).

Palmistry, &c.

By a later statute, persons using any subtle craft, means, or device, by palmistry, or otherwise to deceive Her Majesty's subjects, are dealt with in their true character, namely, as rogues and vagabonds, and are punishable by imprisonment (*q*).

Under this head may be noticed the case of Religious Impostors, who are punishable by fine and imprisonment.

(*m*) For cases v. Arch. 839.

(*n*) 52 Geo. 3, c. 155, s. 12.

(*o*) v. 23 & 24 Vict. c. 32, s. 2.

(*p*) 9 Geo. 2, c. 5.

(*q*) 5 Geo. 4, c. 83, s. 4.

Two offences dealt with by the magistrates may be noticed here briefly:—

Profane swearing is punishable on summary conviction by fine (r).

Profanation of the Sabbath is an offence which has been brought into prominence through recent prosecutions. The statute of Charles II. provides that no person may do any work of his *ordinary* calling upon the Lord's Day, works of necessity and charity only excepted, under penalty of five shillings. Nor may any one expose to sale any wares, on penalty of forfeiting his goods; nor may drovers, &c., travel, under a penalty of forty shillings (s). But no prosecution for such offence may be commenced without the consent of the chief officer of the district, or of two justices, or of a stipendiary magistrate (t).

Profanation of the Sabbath.

Places of amusement, debate, &c., open on Sunday, admission to which is paid for, are to be deemed disorderly houses, and as such may be suppressed, and the keeper fined or imprisoned (u). The Crown has, however, recently been empowered to remit the penalties (w).

Certain practices which were at one time criminally punishable, are now no longer so. *Heresy* which consists not in a total denial of Christianity, but in an open denial of some of its principal doctrines, as held by the Church, has been again subjected only to ecclesiastical correction, *pro salute animæ* (x). Offences against the National Church which are either *negative*,

Heresy, and other acts no longer punishable criminally.

(r) v. 19 Geo. 2, c. 21.

(s) 29 Car. 2, c. 7.

(t) 34 & 35 Vict. c. 87, continued by subsequent statutes.

(u) 21 Geo. 3, c. 49; v. p. 142.

(w) 38 & 39 Vict. c. 80; v. *Terry v. Brighton Aquarium Co.*, L. R. 10 Q. B. 306.

(x) 29 Car. 2, c. 9; 4 Bl. 49.

that is, Nonconformity, or *positive*, by reviling its ordinances, &c. (y), though nominally liable to legal penalties, are never practically made the subjects of prosecution (z).

(y) v. 1 Edw. 6, c. 1; 1 Eliz. c. 2.

(z) As to *Simony*, v. 4 St. Bl. 238; 2 St. Bl. 271.

CHAPTER IV.

OFFENCES AGAINST PUBLIC JUSTICE.

IN the first place we shall treat of that class of offences against public justice which consist in avoiding oneself, or assisting another to avoid, the punishments awarded by a court of justice.

Escape; Breach of Prison; Being at large during a term of Penal Servitude; Rescue; Obstructing Lawful Arrest.

ESCAPE.

The distinction between the first two and fourth offences has been thus put:—Where the liberation of the party is effected either by himself or others, without force, it is more properly called an *escape*; where it is effected by the party himself, with force, it is called *prison breaking*; where it is effected by others, with force, it is commonly termed a *rescue* (a). We have to consider the cases of delinquents in three positions: the prisoner who escapes; the person who aids him; those in whose custody he is, whether officers of the law or private individuals.

Escape, breach of prison, and rescue, distinguished.

If a prisoner escapes out of the custody of the constable, before he is imprisoned, he is punishable with fine and imprisonment.

Officers who, after an arrest, *negligently* allow a prisoner to escape are punishable with fine; if they

Escape from officers.

(a) v. 1 Russ. 577, 582; 1 Hale, P. C. 590.

voluntarily permit it, they are deemed guilty of the same offence, and are liable to the same punishment as the prisoner who escapes from their custody; and this whether the latter has been committed to gaol, or is only under bare arrest. But the officer cannot be thus punished for a felony until after the original offender has been convicted. Before the conviction, however, he may be fined and imprisoned as for a misdemeanor. The allowing the escape is punishable criminally only if the original imprisonment were for some criminal matter.

Escape from
private
persons.

Private individuals having persons lawfully in their custody, who *negligently* allow an escape, are punishable by fine or imprisonment, or both; *if voluntarily*, they are punishable as an officer would be under the same circumstances. Of course at any time they may deliver the person in charge over to an officer.

Aiding to
escape.

Aiding in the escape of a prisoner from a prison, other than a convict, military, or naval prison (*b*), or, with intent so to aid, conveying to him a mask, disguise, instrument, or any other thing, is a felony punishable with imprisonment to the extent of two years (*c*). Aiding a prisoner in custody for treason or felony to make his escape from the constable or officer conveying him under a warrant to prison is a felony punishable with penal servitude to the extent of seven years (*d*). Aiding a prisoner of war to escape is a felony punishable with penal servitude for life (*e*).

BREACH OF PRISON.

Breach of
prison.

The consequences of breach of prison vary according to the crime for which the prisoner is in custody. If

(b) As to these see the statutes quoted in Arch. 838-9.

(c) 28 & 29 Vict. c. 126, s. 37.

(d) 16 Geo. 2, c. 31, s. 3.

(e) 52 Geo. 3, c. 156.

he is in custody for treason or felony, the breach is also felony, and punishable by penal servitude to the extent of seven years; and in the case of a man also by whipping once, twice, or thrice (*f*). If he is in custody for any other offence, the breach is a misdemeanor, and punishable by fine and imprisonment. There seems also to be this difference between the two cases—in the first, it must be proved that the prisoner escaped; in the second, this is not necessary.

To constitute this offence there must be an actual breaking, though it need not be intentional. Merely getting over the wall and the like is an escape only. It will be a sufficient defence to prove that the prisoner has been indicted for the original offence and acquitted; otherwise it is not material whether the accused was guilty of the original offence or not.

“Prison” here includes any place where one is lawfully imprisoned, whether upon accusation or after conviction; for example, in the gaol or constable’s house.

BEING AT LARGE DURING TERM OF PENAL SERVITUDE.

Penal servitude was substituted for transportation in the year 1857 (*g*); but the incidents of the latter attach to the former.

For a convict to be at large without lawful authority, ^{Escape from} which it lies on him to prove, before the expiration of ^{penal} the term of transportation or penal servitude to which ^{servitude.} he was sentenced, is a felony punishable by penal servitude even to the extent of life, and previous imprisonment not exceeding four years; or else by imprisonment not exceeding two years (*h*).

(*f*) 1 Edw. 2, st. 2, c. 1, in Revised Statutes 23 Edw. 1. *Stat. de frang. pris.*

(*g*) 20 & 21 Vict. c. 3.

(*h*) 5 Geo. 4, c. 84, s. 22; 4 & 5 Wm. 4, c. 67.

RESCUE.

Rescue.

Rescue is the forcibly and knowingly freeing another from arrest or imprisonment. If the original offender is convicted, the rescuer is guilty of the same offence as such original, whether it be treason, felony, or misdemeanor. If the rescuer is thus convicted of felony, the punishment is penal servitude to the extent of seven years, or imprisonment from one to three years (i); if of misdemeanor, fine or imprisonment, or both. If the original is not convicted, nevertheless the rescuer may be punished by fine and imprisonment as for a misdemeanor (j).

Rescuing or attempting to rescue a person convicted of murder, whilst proceeding to execution; or rescuing out of prison a person committed for or convicted of murder, is a felony punishable with penal servitude to the extent of life, or imprisonment not exceeding three years (k).

Rescuing or attempting to rescue an offender sentenced to penal servitude from a person charged with his removal, is a felony punishable in the same way as if the party had been in gaol (l).

Poundbreach.

Another offence somewhat of the same character, cattle instead of persons being rescued from the custody of the law, is *Poundbreach*. To rescue cattle distrained for rent or for *damage feasant* is a misdemeanor at common law, punishable by fine and imprisonment, or both.

OBSTRUCTING LAWFUL ARREST, ETC.

Obstructing
lawful arrest.

To prevent the execution of lawful process is at all times an offence, but more especially so when the

(i) 1 & 2 Geo. 4, c. 88, s. 1.

(j) 2 Hawk. c. 21, s. 8.

(k) 25 Geo. 2, c. 37, s. 9; 7 Wm. 4 & 1 Vict. c. 91, s. 1.

(l) 5 Geo. 4, c. 84, s. 22.

object is to prevent the arrest of a criminal. It has been held that the party opposing such an arrest becomes thereby *particeps criminis*, that is, an accessory in felony, otherwise a principal (*m*). The statutes abolishing so-called sanctuaries or privileged places make opposition in those places a felony.

An assault upon, resistance to, or wilful obstruction of, a peace officer in the execution of his duty, or any person acting in his aid; or an assault upon any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, is a misdemeanor, punishable with imprisonment to the extent of two years (*n*). Wounding, doing grievous bodily harm to, shooting at, or attempting to shoot at, any person with such intent, is punishable with penal servitude to the extent of life (*o*).

Not only positively obstructing an officer, but also refusing to aid him in the execution of his duty in order to preserve the peace, is a crime. The latter offence is a misdemeanor at common law (*p*). Refusing to aid an officer.

PERJURY.

The crime committed by one who, when a *lawful* Definition. oath is administered to him in some proceeding in a court of justice of competent jurisdiction, swears wilfully, absolutely, and falsely in a matter material to the issue or point in question (*q*).

Such is the definition of perjury at common law. False oaths not amounting to perjury. The qualification with which it must be taken will appear below. Certain other false oaths are attended

(*m*) 2 Hawk. c. 17, s. 1.

(*n*) 24 & 25 Vict. c. 100, s. 38.

(*o*) Ibid. s. 18.

(*p*) v. *R. v. Brown*, C. & M. 314.

(*q*) 3 Inst. 164; v. *R. v. Aylett*, 1 T. R. 69.

by the punishments of perjury, though they are not known by that name. And whenever an Act of Parliament requires an oath to be taken, but does not make it perjury to take a false oath, though not perjury, the taking such oath is a misdemeanor (*r*) ; for example, the oath required to be taken before a surrogate in order to obtain a marriage licence (*s*).

False affirmations.

It may be necessary to remind the reader that the false affirmation of a Quaker, Moravian, Separatist, or of any other person who is by law authorized to make an affirmation or declaration in lieu of an oath, is on the same footing, and visited with the same consequences, as perjury.

Nature of the oath.

The nature of the oath must first be considered : a lawful oath taken in a judicial proceeding, administered within the authority of the tribunal, &c., administering. As a rule it must be taken in a *court of justice*, but there are apparent exceptions ; for example, it has been held perjury for a clergyman to take a false oath against simony at the time of his institution (*t*). It is immaterial whether the oath be taken in the face of the court, or out of it by a person authorized to examine matters depending in it, as in the case of affidavits ; or whether it be taken in relation to the merits of the cause, or in a collateral matter, for example, on inquiring into the sufficiency of bail (*u*). The oath must be taken before a person who has *jurisdiction* of the cause, and lawful authority to administer the oath. Thus, in the case of a trial, taking place where the court has no jurisdiction, a witness cannot be indicted for perjury thereat. Nor if the court, &c., has authority to administer some oath, but not that which is the foundation of the charge. Every court,

(*r*) Fitz. St. 277.

(*s*) *R. v. Foster*, R. & R. 459.

(*t*) *R. v. Lewis*, 1 Str. 70.

(*u*) 3 Russ. 3.

judge, justice, officer, commissioner, arbitrator, or other person now or hereafter having, by law or by consent of parties, authority to hear, receive, and examine evidence, is empowered to administer an oath to all witnesses legally called (x).

The oath must be taken *falsely*, *wilfully*, and *absolutely*; "falsely" refers to the taking of the oath, not to the truth of what is sworn. It is immaterial whether the fact which is sworn be in itself true or false. The question is, Did the defendant believe what he said to be true? If not, he is guilty of perjury. It is not necessary that he should know that it was untrue; for he will be guilty if he swears to the truth, not knowing anything about the matter; much more if he swears to the truth, thinking what he swears is untrue. In other words, he is guilty if his intention can be proved to be to deceive. Thus he will not be innocent, though he swears that he only *believes* such and such to be the case, if he knows it to be not so. Of course it will be more difficult in such cases to establish the guilt of the defendant (y). As we have just seen, the answer must be given intentionally or wilfully; it must also be given with some degree of deliberation. Mere inadvertence or mistake will not support the charge, as if the witness is bewildered on cross-examination. Of course prevarication, though the actual words used are true, will not shield the defendant; as when a witness assured the court that a man could not live for two hours longer if he went on as he (the witness) left him; the fact being that at the time he was very well, but had got a bottle of gin to his mouth (z).

The taking of the oath.

The matter sworn to must be *material* to the cause depending in the court. If the matter is wholly

Materiality the oath.

(x) 14 & 15 Vict. c. 99, s. 16.

(y) *R. v. Palley*, 1 Leach, 327.

(z) *Loft's Gilb. Ev.* 662.

foreign to the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot be perjury (*a*). Thus, if on a trial to determine whether a person is sane or not a witness introduces his evidence by giving an account of a journey, which he took to see the party, and swears falsely in relation to some of the circumstances of the journey, this would not be sufficient to support an indictment for perjury (*b*).

Acts not
amounting to
perjury.

It is not necessary to constitute perjury that the false oath be believed, or that any person be damaged by it; for the prosecution is grounded, not on the damage to the party, but on the abuse of public justice. A false verdict is not regarded as perjury, because it is said the jurors do not swear to depose the truth, but only to judge of the depositions of others. So the breaking of their oaths by interpreters, officers in charge of the jury, &c., does not amount to perjury;

(*a*) 1 Hawk. c. 69, s. 8; 3 Russ. 10.

(*b*) It is suggested that there is no solid ground for this rule as to materiality; that it originated in a misapprehension. The authorities on which it is based "appear to be cases in which the witness misunderstood the gist of the question, and was so rather mistaken than perjured. If this were so, the inference drawn from the cases ought to be, not that the circumstances must be material, but that the witness must understand that the court requires him to answer specifically upon these points. It is obviously a very different thing to give an answer circumstantially incorrect under a misapprehension of the point of the question asked, and wilfully to swear falsely on some circumstance collateral to the principal point at issue. It clearly ought to be the duty of the witness to give true answers to every question asked by the court. To allow him to answer immaterial questions falsely is to extend an arbitrary impunity to a certain number of perjuries, for it cannot be supposed that any witness knows at the time of swearing whether the question which he answers is material or not."—Fitz. St. 279.

The groundlessness of this rule was adverted to by Erle, C. J., in the following terms: "Whenever the question arises whether a person may not be guilty of perjury, who, with intent to mislead the court, wilfully swears falsely on a matter which, in the opinion of the judge, is of doubtful admissibility, or immaterial to the inquiry, it will be one well worthy of the careful consideration of all the judges."—*R. v. Mullany*, 34 L. J. (M.C.) 111.

inasmuch as it is an essential of perjury that the accused has been sworn to depose to the truth.

Upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved (c).

Perjury is one of the offences included under the *Procedure.* Vexatious Indictments Act; and, therefore, no bill of indictment can be presented to or found by the grand jury unless one of the preliminary steps indicated in the Act has been taken (d).

Any judge (e) may direct the prosecution of a person who appears to have been guilty of perjury in his evidence given before him, and may commit the accused to gaol unless he gives sufficient security for his appearance at the assizes (f).

It is a well-known rule that the testimony of a single witness is not sufficient to convict on a charge of perjury. Two witnesses at least must contradict what the accused has sworn; or, at any rate, one must so contradict, and other evidence must materially corroborate that contradiction (g). But this rule does not apply when the perjury consists in the defendant's having contradicted what he swore on a former occasion; in this case the testimony of a single witness in support of the defendant's own original statement will suffice (h). The reason usually assigned for the rule is, that if one witness were allowed to suffice to prove perjury, it would only be oath against oath. But other considerations, such as the great necessity for the protection of witnesses, also have weight (i).

There must be two witnesses in perjury.

(c) *R. v. Rhodes*, 2 Lord Raym. 886.

(d) v p. 359.

(e) As to who are comprised in this term, see the Act.

(f) 14 & 15 Vict. c. 100, s. 19.

(g) *v. R. v. Boulter*, 21 L. J. (M.C.) 57; 5 Cox, 543.

(h) *R. v. Knill*, 5 B. & Ald. 929, n.

(i) *v. Best*, Ev. 754. This rule seems to be a second instance (v. p. 24) of the law's interference with the province of the jury. It should always be a part of their duty to estimate the credibility of witnesses.

Punishment. Perjury is a misdemeanor. At one time it was punished with death; afterwards with fine and imprisonment. Now the punishment is again more severe, namely, penal servitude to the extent of seven years, or imprisonment to the same extent (*k*).

SUBORNATION OF PERJURY.

Subornation. The procuring another to **take** such a false oath as constitutes perjury in the principal (*l*). The offence does not amount to subornation if that other does **not** actually take the false oath; but it is nevertheless punishable.

The punishment for subornation is the same as for perjury itself: and the same course has to be taken under the Vexatious Indictments Act (*m*).

VOLUNTARY OATHS.

Administering or taking voluntary oaths. It will be remembered that in a former chapter (*n*) it was shewn that administering or taking certain oaths was illegal and an offence against Government. This section deals with quite another matter. The evil to be guarded against in this case is the misuse of a valuable engine of the law, and the consequent weakening of its effect when resorted to on proper occasions.

It is unlawful for a justice of the peace or other person to administer or receive, or cause or allow to be administered or received, any oath, affidavit or solemn affirmation touching any matter whereof he has not jurisdiction or cognizance by some statute in force (*o*).

(*k*) 2 Geo. 2, c. 25, s. 2. In cases where another's life is wilfully "sworn away" by a perjurer, it is hard to see why the latter should not be regarded as guilty of murder. The punishment for the crime is by no means excessive.

(*l*) 4 Bl. 138.

(*m*) For a list of statutes applicable to perjury, &c., v. Arch. 887.

(*n*) v. p. 57.

(*o*) 5 & 6 Wm. 4, c. 62, s. 13.

The offence is a misdemeanor, punishable by fine or imprisonment, or both. The administering, &c., is punishable, although the person did not act wilfully in contravention of the statute, but only inadvertently (*p*).

FALSE DECLARATIONS.

A great number of statutes declare punishable false declarations with regard to the subjects with which such statutes deal. We will merely mention a few of the chief (*q*):—

Statutes punishing false declarations.

Parliamentary elections: 6 Vict. c. 18, s. 81; 35 & 36 Vict. c. 33.

Municipal elections: 5 & 6 Wm. 4, c. 76, s. 34; 35 & 36 Vict. c. 33.

Under the Bankruptcy Act, 1869: 32 & 33 Vict. c. 62, s. 14.

In matters relating to the customs, excise, &c.: 16 & 17 Vict. c. 107, s. 198; 18 & 19 Vict. c. 96, s. 38.

Before Registrars as to Births, Marriages, or Deaths: 6 & 7 Wm. 4, c. 86, s. 41; 37 & 38 Vict. c. 88, ss. 40, 46.

Before Magistrates: 5 & 6 Wm. 4, c. 62, s. 18.

BRIBERY.

The corrupt treatment of one intrusted with a public charge, to influence him in the discharge of his duty in that character.

The offence, which may be thus generally defined, comprises acts differing considerably from each other. They may be divided into two classes:—

Bribery a wide term.

(*p*) *R. v. Nott*, 12 L. J. (M.C.) 143.

(*q*) A full list will be found in Arch. 887, and with more detailed treatment in Rosc. 475.

1. Where some person concerned in the administration of public justice (*r*) is approached by one bringing him a reward, in order to influence his conduct in his office.

2. Where some person having it in his power to procure, or aid in procuring, for another a public place or appointment, is so approached (*s*).

Bribery to influence conduct of one in office.

1. The offence of *offering* to, or *receiving* by, an officer, judicial or ministerial (*t*), an undue reward to influence his behaviour in his office, is a misdemeanor punishable by fine and imprisonment. Both the giver and the taker are guilty. And though the reward be refused, the offerer is equally punishable for the attempt. The offence is not restricted to the case of influencing the higher officers, such as judges or members of the Government; but extends to those in a subordinate position, for example, constables, as if one bribe a constable to refrain from executing a warrant. A particular species of bribery, viz., corruptly influencing jurymen, will be treated of hereafter under the title *embracery* (*u*).

Bribery to procure place, &c.

2. For the sake of convenience we may distinguish two varieties of this offence:—

i. When the place or appointment is in the gift of some public officer.

ii. When it is determined by public election.

i. This offence may also be regarded as following under the first class (*i*), inasmuch as the presentation to the place by the public officer is one of the duties of

(*r*) v. *infra*, as to ministerial officers.

(*s*) v. 1 Hawk. c. 67, ss. 1-3.

(*t*) The text books, in general, confine the offence of bribery to a bribery of judicial officers; but this definition of the offence seems too narrow. Arch. 891.

(*u*) v. p. 95.

his office. The offence is a misdemeanor. Even the attempt to procure an appointment by offering a sum of money to a cabinet minister was punished as a misdemeanor (*x*).

By particular statutes it has also been provided that persons selling public offices shall lose all right to the appointment, and the buyers shall not only be rejected, but also be disabled from ever holding such office (*y*). Those buying or selling, or receiving or paying money or rewards for offices, are guilty of a misdemeanor (*z*). So also are persons who do not thus directly buy or sell, but who pay money for soliciting or obtaining offices, or any negotiations or pretended negotiations relating thereto (*a*). Certain other offences in connection with the traffic in offices (*b*) are dealt with ; and certain exceptions are made, for example, the sale of commissions in the army (*c*).

Consequences
of trafficking
in public
offices.

ii. Bribery at elections.

As to *parliamentary* elections.—The law on this subject was contained chiefly in the Corrupt Practices Prevention Act, 1854 (*d*), amended by later statutes, which to the extent mentioned below are repealed by the Corrupt and Illegal Practices Prevention Act, 1883 (*e*).

Bribery at
parliamentary
elections.

(*x*) *R. v. Vaughan*, 4 Burr. 2494.

(*y*) 5 & 6 Edw. 6, c. 16, s. 2 ; 49 Geo. 3, c. 126, s. 1.

(*z*) 49 Geo. 3, c. 126, s. 3.

(*a*) *Ibid.* s. 4.

(*b*) As to what offices are within the statute, v. 1 Russ. 311 ; 3 Chitty, St. 465.

(*c*) It is almost needless to remind the reader that the force of this exception was taken away by the Royal Warrant of July 1871, abolishing purchase. v. 34 & 35 Vict. c. 86.

(*d*) 17 & 18 Vict. c. 102, amended by 21 & 22 Vict. c. 87 ; 26 Vict. c. 29 ; 30 & 31 Vict. c. 102, s. 49 ; 31 & 32 Vict. c. 125, ss. 43-47. As to these Acts, the Corrupt Practices Act of 1883 has repealed the following, viz. : ss. 1, 4, 5, 6, 9, 14, 23, 36, 39, and parts of 2, 3, and 38 of the first of these Acts ; the whole of the second, the whole of the third except s. 6, part of s. 34 of the fourth, and ss. 43, 45, 46, and 47 of the fifth.

(*e*) 46 & 47 Vict. c. 51.

This Act and the Corrupt Practices Prevention Act (*f*), that is, the unrepealed parts of them, are to be cited together as the Corrupt Practices Prevention Acts, 1854 to 1883, and contain the law on the subject.

On the part of
the candidate.

The offences declared to be bribery on the part of the *candidate* or his agents are the following:—

(a.) To, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend; or offer, promise, or promise to procure, or to endeavour to procure, any *money*, or *valuable consideration* (*g*), to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote, or refrain from voting, or to corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election. An offer to pay rates, &c., has been since included in this offence (*h*).

(b.) To give, &c., any *office, place, or employment*, under the same circumstances (*i*).

(c.) To do any of the things mentioned above, in order to induce the person benefited to procure, or endeavour to procure, the return of any person, or any vote (*i*).

(d.) The act of the person so procuring, &c. (*i*).

(e.) To pay, &c., money, with the intent that it shall be expended in bribery; or knowingly to pay it in discharge of what has been so expended (*i*).

Besides these, there are other offences on the part of

(*f*) 17 & 18 Vict. c. 102; 26 & 27 Vict. c. 29; 31 & 32 Vict. c. 125; 35 & 36 Vict. c. 33; 42 & 43 Vict. c. 75.

(*g*) 17 & 18 Vict. c. 102, ss. 2 and 3.

(*h*) 30 & 31 Vict. c. 102, s. 49.

(*i*) 17 & 18 Vict. c. 102, s. 2.

the candidate or his agents declared by the Act of 1883, and comprised in the terms "corrupt practice," viz.:

A. Treating and undue influence as defined by the Act of 1883.

B. Bribery and personation as defined by the Acts of 1854, 1867, 1868, and 1872.

C. Illegal practice as defined by the Act of 1883.

Treating is thus defined:—To directly or indirectly give or provide or pay wholly or in part the expense of giving or providing any meat, drink, entertainment or provision to or for any person, for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting or being about to vote or refrain from voting at such election (*j*).

Undue influence is thus defined:—To directly or indirectly make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten to inflict any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or by abduction, duress, or any fraudulent device or contrivance to impede or prevent the free exercise of the franchise of any elector, or thereby to compel, induce, or prevail upon any elector either to give or refrain from giving his vote at any election (*k*).

The definition of bribery has already been given (*supra*).

(*j*) 46 & 47 Vict. c. 51, s. 1.

(*k*) Ibid. s. 2.

Personation is thus defined :—To apply for a ballot-paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or, having once voted at any election, to apply at the same election for a ballot-paper in his own name (*l*).

Illegal practice consists of the following :—

1. To make a payment or contract for payment for the purpose of promoting or procuring the election of a candidate—
 - (a.) On account of the conveyance of electors to or from the poll, whether for the hiring of horses or carriages, or for railway fares or otherwise ;
 - (b.) On account of the use of any house, land, building, or premises for, or on account of, the exhibition of any address, bill, or notice ;
 - (c.) On account of any committee-room in excess of the numbers allowed (*m*).
2. To incur expense in excess of the maximum allowed (*n*).

The commission of any corrupt practice other than personation is a misdemeanor, and is punishable by imprisonment for a term not exceeding one year, or a fine not exceeding £200 (*o*).

The offence of personation is a felony, and is punish-

(*l*) 35 & 36 Vict. c. 33, s. 24.

(*m*) 46 & 47 Vict. c. 51, s. 7.

(*n*) Ibid. s. 8.

(*o*) Ibid. s. 6.

able by imprisonment for a term not exceeding two years with hard labour (*o*).

The commission of an illegal practice is punishable on summary conviction by a fine not exceeding £100 (*p*).

The following are offences on the part of the voter, ^{On the part of the voter.} in addition to such of the above-mentioned as are applicable to a voter :—

A. Bribery, which is further defined thus :

- (1.) To directly or indirectly receive, agree, or contract for any money gift, loan, or valuable consideration, office, place, or employment, for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any election (*q*).
- (2.) To directly or indirectly receive any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting at any election (*q*).

B. Illegal practice, which consists also of the following :

- (1.) To vote or induce or procure any person to vote at an election with the knowledge that such person is prohibited from voting (*r*).
- (2.) To knowingly publish a false statement

(*p*) 46 & 47 Vict. c. 51, s. 10.
 (*q*) 17 & 18 Vict. c. 102, s. 3.
 (*r*) 46 & 47 Vict. c. 51, s. 9.

of the withdrawal of a candidate at an election for the purpose of promoting or procuring the election of another candidate (*r*).

Further offences.

There are other offences, such as the illegal payment of money for other than the allowable expenses, the employment of carriages, horses, &c., corrupt withdrawal from a candidature (*s*). These are also punishable on summary conviction by a fine not exceeding £100 (*t*).

Proceedings on the above offences must be commenced within a year from the time of the offence committed, or within three months after the report by Election Commissioners is made where the inquiry before such Commissioners is commenced within one year after the offence is committed (*u*).

Disqualifications attaching to those guilty of bribery, &c.

Certain disqualifications also attach to candidates and others who have been found guilty of bribery, corrupt practice, &c. For instance, if any corrupt practice other than treating or undue influence has been proved to have been committed in reference to such election by or with the knowledge and consent of any candidate at such election, or if any treating or undue influence has been committed by any candidate at an election, such candidate shall never be elected to or sit in the House of Commons for the same constituency; and if a candidate is guilty of any corrupt practice by agents, he is incapacitated for seven years from being elected to or sitting in the House of Commons for the same constituency (*w*). If a voter is guilty of any corrupt practice, he is incapacitated for seven years from being elected to the House of Commons, or from being registered as an elector or voting

(*r*) 46 & 47 Vict. c. 51, s. 6.

(*s*) Ibid. ss. 13, 14, and 15.

(*t*) Ibid. s. 21.

(*u*) Ibid. s. 51.

(*w*) Ibid. ss. 4 and 5.

at an election, or from holding any public or judicial office (*x*). If any illegal practice has been committed by or with the knowledge and consent of a candidate he cannot be elected to the House of Commons for the same constituency for seven years; and if he has been guilty of illegal practice by his agents he is incapable of being elected to the House of Commons during that Parliament (*y*). If a voter has been guilty of illegal practice, he is for five years incapacitated from being registered as an elector or voting at an election or holding a public office within the same constituency (*z*).

As to *municipal* elections.—Any person who is guilty of a corrupt practice at such an election is liable to the like actions, prosecutions, penalties, forfeitures, and punishments, as if the corrupt practices had been committed at a parliamentary election (*a*).

EMBRACERY, ETC.

Embracery is an attempt to influence a jury corruptly to give a verdict in favour of one side or party, by promises, persuasions, entreaties, money, entertainments, and the like. Thus it appears to be a particular kind of bribery. A juryman himself may be guilty of this offence by corruptly endeavouring to bring over his fellows to his view. The offence is a misdemeanor, both in the person making the attempt, and also in those of the jury who consent. The punishment—both at common law and by statute—is fine and imprisonment (*b*).

There are certain other acts interfering with the free administration of justice at a trial, which are considered

Embracery.

Other offences preventing a fair trial.

(*x*) 46 & 47 Vict. c. 51, s. 6.

(*y*) Ibid. s. 11.

(*z*) Ibid. s. 10.

(*a*) 45 & 46 Vict. c. 50, ss. 77–80.

(*b*) 6 Geo. 3, c. 50, s. 61.

as high misprisions and contempts, and are punishable by fine and imprisonment. Such are the following:—

Intimidating the parties or witnesses.

Endeavouring to dissuade a witness from giving evidence, though it be without success.

Advising a prisoner to stand mute.

Assaulting or threatening an opponent for suing him; a counsel or attorney for being employed against him; a juror for his verdict; a gaoler or other ministerial officer for what he does in the discharge of his duty.

For one of the grand jury to disclose to the prisoner the evidence against him.

There are three offences, somewhat liable to confusion, which consist in an unlawful interference in another's suit, or in stirring up such suits:—

Common Barratry; Maintenance; Champerty.

COMMON BARRATRY.

Common
barratry.

The offence of *frequently* inciting and stirring up suits and quarrels between Her Majesty's subjects, either at law or otherwise (c). It is insufficient to prove a single act, inasmuch as it is of the essence of the offence that the offender should be a *common* barrator. Of course it is no crime for a man frequently to bring actions in his own right, though he be unsuccessful, unless they are purely groundless and vexatious.

The offence is a misdemeanor, punishable by fine

and imprisonment. If the offender is connected with the legal profession, he is disabled from practising for the future. If, having been convicted of this offence, he afterwards practises, the court may inquire into the matter in a summary way; and on the subsequent practising being proved, the offender may be sentenced to penal servitude to the extent of seven years (*d*).

Another offence of a like nature may be noticed, namely, suing in the name of a fictitious plaintiff. If committed in the superior courts it is a high contempt, punishable at their discretion. If in the inferior courts, it is punished by imprisonment for six months, and treble damages to the person injured (*e*).

Suing in name
of fictitious
plaintiff.

MAINTENANCE.

The officious intermeddling in a suit that in no way belongs to one, by *maintaining* or assisting either party with money or otherwise, to prosecute or defend it (*f*). It is a misdemeanor punishable by fine and imprisonment (*g*).

Maintenance.

It has been declared to be maintenance to bear the whole or part of the expenses of the suit for another, or to retain a solicitor or counsel for him. But acts of this kind are justifiable in respect of an interest in the thing in variance, as that of a reversioner; of kindred or affinity; of other relations, *e.g.*, landlord and tenant, master and servant; of charity, *e.g.*, to enable a poor man to carry on his suit; of the profession of the law, *e.g.*, to act as counsel or solicitor. And it may

(*d*) 12 Geo. 1, c. 29, s. 4, made perpetual.

(*e*) 8 Eliz. c. 2.

(*f*) 1 Hawk. c. 83, s. 23.

(*g*) This maintenance is sometimes termed *curialis*, to distinguish it from another species—*ruralis*, which latter consists in assisting another to his pretensions to lands, or holding them for him by force or subtility, or stirring up quarrels or suits in the county, in relation to matters wherein he is no way concerned. (Bac. Abr.) This seems to approach the crime of barratry.

be said generally, that the courts would be very loth at the present day to declare an act of this kind to be an offence criminally indictable, unless some corrupt motive were manifestly present. This remark also applies to the next offence.

CHAMPERTY.

Champertry. Champertry is a species of maintenance. The distinguishing feature is, that the bargain is made with the plaintiff or defendant *campum partire*, that is, in the event of success to divide the land or other subject-matter of the suit with the champertor in consideration of his carrying on the party's suit at his own expense. Thus it has been held punishable as champerty to communicate such information as will enable a party to recover a sum of money by action, and to exert influence in procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered (*h*).

COMPOUNDING OFFENCES.

Mere forbearance to prosecute, no crime. A private individual is not obliged to set the law in motion for the prosecution of a criminal, though, as we shall see, he is punishable for the concealment of treason or felony (*i*). Thus, merely to forbear to prosecute is no offence; there is wanting something else to constitute a crime, and this essential is the taking some reward or advantage.

Under this title we shall treat of compounding (a) felonies; (b) misdemeanors; (c) informations on penal statutes; noticing also the offence of taking rewards for helping to recover stolen goods.

Compounding felony.

(a.) *Compounding felony*, or forbearing to prosecute

(h) *Stanley v. Jones*, 7 Bing. 369.

(i) v. p. 101.

a felon on account of some reward received, is a misdemeanor, punishable by fine and imprisonment (*j*). Of course the reward need not be of a monetary nature, but may be any advantage proceeding from or on behalf of the felon and accruing to the person who forbears. The most common form of this crime is what was anciently known as *theft-bote*, that is, the forbearing to prosecute a thief, on consideration of receiving one's stolen goods back again, or other advantage. But the mere taking back stolen goods, without shewing any favour to the thief, is no crime. After the compounding, the compounder having prosecuted the felon to conviction, the judge directs an acquittal for the compounding (*k*).

To corruptly take any reward for helping a person to property stolen or obtained, &c., by any felony or misdemeanor (unless all due diligence to bring the offender to trial has been used), is a felony punishable by penal servitude to the extent of seven years (*l*). An advertisement offering a reward for the return of stolen or lost property, using words purporting that no questions will be asked, or seizure or inquiry made after the person producing the property, or that return will be made to any pawnbroker or other person who has bought or made advances on such property—renders the advertiser, printer, and publisher liable to forfeit £50 each (*m*). But an action cannot be brought to recover the forfeiture from the printer or publisher except within six months after the forfeiture is incurred; nor at all without the consent of the Attorney or Solicitor General (*n*).

Taking reward
for return of
stolen pro-
perty, &c.

(*j*) It must be confessed that the English system, by leaving prosecutions to so great an extent in private hands, does its best to encourage this class of offence.

(*k*) *R. v. Stone*, 4 C. & P. 379.

(*l*) 24 & 25 Vict. c. 96, s. 101.

(*m*) *Ibid.* s. 102.

(*n*) 33 & 34 Vict. c. 65, s. 3.

Compounding
misdemeanors.

(b.) *Compounding misdemeanors* seems strictly to be illegal, as impeding the course of public justice. But *after conviction*, the court not uncommonly allows a course to be adopted which comes to the same thing. If the misdemeanor principally and more immediately affects an individual (such as one for which he might sue and recover in a civil action), as a battery, imprisonment, or the like, the court sometimes permits the defendant to *speak with the prosecutor*, before any judgment is pronounced; and if the prosecutor declares himself satisfied, inflicts but a trivial punishment (o). But this will not be allowed if the offence is of a more public nature (p).

Compounding
informations
upon penal
statutes.

(c.) *Compounding informations upon penal statutes*.—In order to promote the discovery and punishment of crime, many statutes imposing a penalty on the offender award the penalty, either in part or in whole, to any person who prosecutes, hence termed a *common informer*. It is clearly a gross abuse of this arrangement, not only tending to the escape of offenders, but also encouraging malicious threats of proceedings, for a person to take a reward on condition that he do not act as an informer. Accordingly it has been enacted that if any person informing, under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him, he forfeits £10, and is liable to such imprisonment and further fine as the court shall award, and is for ever disabled from suing on any popular or penal statute (q). A person may be thus convicted of taking a reward for forbearing to prosecute, although no offence liable to a penalty has been committed by the person from whom the money is taken (r).

(o) This course is pursued to reimburse the prosecutor for his expenses, and make him some private amends without the trouble and circuity of a civil action. But it surely is a dangerous practice. 4 Bl. 363.

(p) *v. Keir v. Leeman*, 6 Q. B. 308; 9 Q. B. 371.

(q) 18 Eliz. c. 5; 56 Geo. 3. c. 138, s. 2.

(r) *R. v. Best*, 9 C. & P. 368.

MISPRISION OF FELONY.

Misprision of felony is the concealment of some ^{Misprision of felony.} felony (other than treason (s)) committed by another. There must be knowledge of the offence merely, without any assent; for if a man assent, he will either be a principal or an accessory. Thus one will be guilty of misprision who sees a felony committed, and takes no steps to secure the apprehension of the offender. The offence is a misdemeanor, punishable by fine and imprisonment.

CRIMINAL DEALINGS WITH RECORDS.

Certain offences with regard to judicial records and documents are severely punished. They chiefly fall ^{Records: stealing, forging, &c.} under the heads of "Larceny" and "Forgery." A mere enumeration of the chief of these offences will suffice here, more particulars being given under the titles referred to above:—

Stealing, injuring, &c., records, &c.: 24 & 25 Vict. c. 96, s. 30 (t).

Forging, &c., records, &c.: 24 & 25 Vict. c. 98, ss. 27-31 (u).

For an *employée* in the Record Office to certify a writing as a true copy of a record knowing it to be false, is punishable by penal servitude to the extent of life, or imprisonment from two to four years (w).

EXTORTION AND OTHER MISCONDUCT OF PUBLIC OFFICERS.

Every malfeasance, or culpable non-feasance of an ^{Misconduct in office.}

(s) Misprision of treason, v. p. 54.

(t) v. p. 204.

(u) v. p. 263.

(w) 1 & 2 Vict. c. 94, s. 19. See also Evidence Amendment Act, 14 & 15 Vict. c. 99. For a full list of offences of the nature of forgeries of records, v. Arch. 652.

officer of justice, with relation to his office, is a misdemeanor punishable by fine or imprisonment, or both. Forfeiture of his office, if a profitable one, will also generally ensue. Under the term "officers of justice" are included not only the higher officers, as judges, sheriffs, but also those of a lower rank, as constables, overseers, &c.

Malffeasance. As to *malffeasance* (x).—In cases of oppression and partiality the officers are clearly punishable: and not only when they act from corrupt motives, but even when this element is wanting, if the act is clearly illegal (y), for example, for a magistrate to commit in a case in which he has no jurisdiction. The proceedings will generally be by impeachment, or information in the Queen's Bench, according to the rank of the offender; but an indictment will also lie.

Extortion. Extortion, in the more strict sense of the word, consists in an officer's unlawfully taking, by colour of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due (z). But it is not criminal to take a reward, voluntarily given, and which has been usual in the case, for the more diligent or more expeditious performance of his duty.

Non-feasance. As to *non-feasance*.—An officer is equally liable for neglect of his duty as for active misconduct. Thus an overseer is indictable for not providing for the poor (a). A refusal by any person to serve an office to which he has been duly appointed, and from which he has no ground of exemption, is an indictable offence.

(x) *Bribery*, v. p. 36.

(y) *R. v. Sainsbury*, 4 T. R. 451.

(z) 4 BL 141.

(a) v. also 11 Geo. 1, c. 4.

CONTEMPT OF COURT.

A contempt of court is a disobedience to the rules, orders, process, or dignity of a court which has power to punish such offences. It is only courts of *record* that have power to fine and imprison for contempt of their authority (*b*). The offence is by no means confined to what is popularly known as "contempt of court:" it includes a variety of acts, some of which appear to have only a remote connection with the courts.

Contempts may be divided into two classes:—

1. *Direct*, "which openly insult or resist the powers of the courts, or the persons of the judges who preside there."

2. *Consequential*, "which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of their authority."

They may be also thus classified:—

1. Those committed *in* the court itself—for example, by persistently applauding during a trial, or any other wilful disturbance.

2. Those committed *out* of court—for example, by tampering with witnesses, jurors, &c.

The following are the chief instances (*c*):—

(a) By *inferior judges and magistrates*—by acting unjustly, oppressively, or irregularly in their adminis-

Chief cases of
contempts.

(*b*) Courts of Record are those whose judicial acts and proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called the *records* of the court, and their truth cannot be questioned. This power to fine and imprison is one of their chief distinguishing marks; and the very erection of a new jurisdiction with power of fine and imprisonment, makes it instantly a court of record. v. 3 St. Bl. 271.

(*c*) 2 Hawk. §. 22.

tration; or by disobeying writs issued out of the superior courts; by proceeding in a cause after it has been put a stop to or removed by writ of prohibition, *certiorari*, error, *supersedeas*, and the like. These are regarded as contempts of the superior courts (and especially the Queen's Bench Division), which have a general superintendence over all inferior jurisdictions.

(b.) By *sheriffs, bailiffs, gaolers, and other officers of the court*—by abusing the process of the law, or deceiving the parties by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty.

(c.) By *solicitors*, who are also officers of the court—by gross instances of fraud and corruption, injustice to clients, or other dishonest practices (*d.*).

(d.) By *jurymen*—in collateral matters relating to the discharge of their office, as by making default when summoned; refusing to be sworn or to give any verdict; eating or drinking without the leave of the court—especially at the cost of either party; and other misbehaviour of a similar kind; but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict.

(e.) By *witnesses*—by making default when summoned; refusing to be sworn or examined, or prevaricating in their evidence when sworn.

(f.) By the *parties* to any suit or proceeding before the court, who by force or fraud wilfully prevent or obstruct the course of justice; also by disobedience to any rule or order, made in the progress of a cause; by non-payment of costs, or by non-observance of awards which have been made rules of court.

(g.) By *any persons*—including a great variety of acts which imply disrespect to the court's authority. Any riotous, noisy, or indecent conduct in court, calcu-

(d) As to a barrister, v. *Ex parte Pater*, 5 B. & S. 299.

lated to interrupt the proceedings, or to bring discredit upon the court.

Of another class are those committed by the offender not present in court—for example, by disobeying or treating with disrespect the Queen's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts of causes then depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of their authority is entirely lost among the people (e).

Contempts
committed out
of court.

The proceedings on a contempt of court are of two Proceedings. kinds:—

1. If the contempt is committed *in the face* of the court—the offender may be instantly apprehended and imprisoned at the discretion of the judges, without any further proof or examination.

2. In the case of contempts committed *out* of court—if the judges see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to shew cause why an *attachment* should not issue against him; or in very flagrant cases, the attachment issues in the first instance.

(e) As to contempt in general, see *Miller v. Knox*, 4 Bing. N. C. 574.

CHAPTER V.

OFFENCES AGAINST THE PUBLIC PEACE.

Offences more particularly against the public peace.

MANY of the crimes mentioned in other chapters involve a breach of the peace. But the offences now to be dealt with are those in which the breach of the peace is the prominent feature. In some, for example in libel, at first sight the injury done to the individual appears to be the principal point; but a consideration of the way in which the law deals with the offence shews that it is otherwise. Thus, proof of the truth of a libel will not amount to a defence, unless it was for the public benefit that the matter should be published.

RIOTS (*f*).

There are two minor offences, which, as steps to the graver crime of riot, must first be noticed.

Unlawful assembly.

An *unlawful assembly* is any meeting of three or more persons under such circumstances of alarm, either from the large numbers, the mode or time of the assembly, &c., as in the opinion of firm and rational men are likely to endanger the peace; there being no aggressive act actually done (*g*). All parties joining in and countenancing the proceedings are criminally liable. It is generally considered that the intention must be to do something which, if actually executed, would amount to a riot (*h*). But a lawful assembly is not rendered unlawful by reason of the knowledge of those

(*f*) For riotous destruction of churches and other buildings, v. p. 278.

(*g*) *R. v. Vincent*, 9 C. & P. 91.

(*h*) For unlawful assemblies of another nature, v. p. 58.

taking part in it that opposition will be raised to it, which opposition will in all probability give rise to a breach of the peace by those creating it (i).

A *rout* is said to be the disturbance of the peace Rout. caused by those who, after assembling together to do a thing which, if executed, would amount to a riot, *proceed* to execute that act, but do not actually execute it. It differs from a riot only in the circumstance that the enterprise is not actually executed.

A *riot* is a tumultuous disturbance of the peace by Riot. *three* or more persons, assembling together of *their own authority*, with an intent mutually to assist one another against any who oppose them in the execution of some enterprise of a *private* nature, and afterwards *actually executing* the same, in a violent and turbulent manner, to the terror of the people, and this whether the act intended be of itself *lawful or unlawful* (j).

An example will more clearly shew the difference between these three crimes. A hundred men armed with sticks meet together at night to consult about the destruction of a fence which their landlord has erected: this is an unlawful assembly. They march out together from the place of meeting in the direction of the fence: this amounts to a rout. They arrive at the fence and, amid great confusion, violently pull it down: this is a riot.

To constitute a riot, the object need not be unlawful, Essentials of a riot. if the acts are done in a manner calculated to inspire terror. But there must be an unlawful *assembly*: therefore a disturbance arising among people already met together will be a mere affray; unless, indeed, there be a deliberate forming into parties. The object

(i) *Beatty v. Gillbanks*, 51 L. J. (M.C.) 117; 9 Q. B. D. 308.

(j) 1 Hawk. c. 65, s. 1.

must be of a local or private nature ; otherwise, as if to redress a public grievance, it amounts to treason (*k*).

The gist of the offence is the *unlawful manner of proceeding*, that is, with circumstances of force or violence. Therefore assembling for the purpose of an unlawful object, and actually executing it, is not a riot, if it is done peaceably (*l*).

These three offences are misdemeanors, punishable by fine or imprisonment, or both.

Riot Act.

For the case of riots which assume a more formidable aspect, further provision is made by statute (*m*). If twelve or more persons are unlawfully assembled to the disturbance of the peace, and being required by proclamation (*n*), by a justice of the peace, sheriff, or under-sheriff, mayor, or other head officer of a town, to disperse, they then continue together for an hour after, they are guilty of felony, and liable to penal servitude to the extent of life, or imprisonment not exceeding three years (*o*). It is a felony attended by the same punishment to oppose the reading of the proclamation : and this opposition will not excuse those who know that the proclamation would have been read, had it not been for this hindrance (*p*). Prosecutions under this Act must be commenced within twelve months after the commission of the offence (*q*).

(*k*) v. p. 50.

(*l*) v. 1 Hawk. c. 65.

(*m*) Riot Act, 1 Geo. 1, st. 2, c. 5.

(*n*) "Reading the Riot Act."

(*o*) 1 Geo. 1, st. 2, c. 5, s. 1. The form of proclamation is prescribed by the statute, "Our sovereign lord the king chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies—God save the King."

(*p*) Ibid. s. 5.

(*q*) Ibid. s. 8.

A course of proceeding founded on an old statute (*r*), *Posse comitatds.* still unrepealed, is provided for offences of this character. Any two justices, together with the sheriff or undersheriff of the county, may come with the *posse comitatds* (*i.e.*, a force consisting of all able-bodied men except clergymen) and suppress a riot, rout, or unlawful assembly; may arrest the rioters; and make a record of the circumstances on the spot, which will be sufficient evidence of the conviction of the offenders. Any battery, wounding, or killing that may happen in suppressing the riot is justifiable.

AFFRAY.

A fighting between two or more persons in some *Affray.* *public* place, to the terror of Her Majesty's subjects; for example, a prize fight. If it takes place in private, it will be an assault. It differs from a riot, inasmuch as there must be three persons to constitute the latter, and also in not being premeditated.

Mere quarrelsome or threatening words do not amount to an affray; though of course, according to first principles (*s*), a person may be guilty of an affray, though he uses no actual force himself; for example, by assisting at a prize fight. The offence may be aggravated in several ways; for example, on account of its dangerous tendency, *e.g.*, a duel; on account of the position of the person against whom it is committed, *e.g.*, an arresting officer; on account of the place where it happens, *e.g.*, in a church or churchyard. In the last case even quarrelsome words are punishable. *Aggravations.*

An affray may be suppressed and the parties separated by a private person who is present; and of course a peace officer is bound to interfere. The *Suppression and punishment.*

(*r*) 13 Hen. 4, c. 7.

(*s*) v. p. 34.

offence is a misdemeanor, punishable by fine or imprisonment, or both.

CHALLENGE TO FIGHT.

Challenge to fight.

(a) To challenge to fight, either by word or letter ; or (b) to be the bearer of such challenge ; or (c) to provoke another to send a challenge, is a misdemeanor punishable by fine or imprisonment, or both. It is not necessary that actual fighting should follow. Provocation, however great, is no justification (*t*), though it may mitigate the sentence of the court.

SENDING THREATENING LETTERS.

Threatening letters.

It is very obvious that the receipt of a threatening letter is not unlikely to lead to a breach of the peace on the part of the receiver. Therefore to prevent such breach, and at the same time to punish what is an offence against the security of the subject, it has been provided that, if any person, knowing the contents, sends or delivers any letter or writing threatening to burn or destroy any house, barn, or other building, or grain or other agricultural produce in a building, or any ship ; or to kill, maim, or wound any cattle, he is guilt of felony, and may be punished by penal servitude to the extent of ten years (*u*). The same consequences are attached to sending letters threatening to murder (*w*).

Extortion by means of threats.

It will be convenient to notice here certain other cases of sending threatening letters, though their nature admits also of their being treated of under the title "Larceny." If any person, knowing the contents, sends or delivers any letter or writing, *demanding with menaces* and without reasonable cause any chattels, money, or other property, he is punishable for the felony by penal

(*t*) *R. v. Rice*, 3 East, 581.

(*u*) 24 & 25 Vict. c. 97, s. 50.

(*w*) *Ibid.* c. 100, s. 16.

servitude to the extent of life (x). If the threatening be otherwise than by letter, the limit of the penal servitude is five years (y). Sending a letter or writing containing to the knowledge of the sender accusations or threats to *accuse any person of a crime* punishable by law with death or penal servitude for not less than seven years, or of an assault with intent to commit a rape, or of an attempt to commit a rape or an unnatural crime—is a felony punishable by penal servitude to the extent of life (z). The punishment is the same though the threat to accuse of any of these crimes be not by letter (a). It is immaterial whether the person threatened be innocent or guilty of the offence imputed to him (b), inasmuch as the gist of the offence is the extortion. The same punishment is awarded in the case of one inducing another by violence or threats to execute a deed, &c., with intent to defraud (c).

LIBEL AND INDICTABLE SLANDER.

Offences of this class are rightly considered as affecting the public peace, inasmuch as their tendency is directly to provoke breaches of the peace. This will appear from the definition of a libel.

A libel is a malicious defamation made public either by printing, writing, signs, pictures, or the like, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, by exposing him (or his memory) to public hatred, contempt, or ridicule (d).

Definition of
libel.

(x) 24 & 25 Vict. c. 96, s. 44.

(y) Ibid. s. 45.

(z) Ibid. s. 46.

(a) Ibid. s. 47.

(b) *R. v. Gardner*, 1 C. & P. 479.

(c) 24 & 25 Vict. c. 96, s. 48.

(d) v. 1 Hawk. c. 73. This definition refers only to private libels, and not to those already noticed, of a seditious, blasphemous, or indecent nature (v. pp. 56, 73). But in all cases of libel the ground of criminal

Civil and
criminal pro-
ceedings in
libel.

To those who are aggrieved by a libel two courses are open, either to prosecute the offender criminally by indictment or information, or to seek redress by a civil action. This is the general rule, but there are cases where the injured party has a remedy by action, though the wrongdoer is not criminally punishable. The principle is that whenever an action will lie for a libel without shewing special damage (in other words, where the particular injury to the individual is not the prominent feature, but the incitement to a breach of the peace is) an indictment will also lie. While, on the one hand, there are cases (the gist of which is the loss to a person libelled and not the public offence) which are the subject of civil but not of criminal proceedings; on the other hand, sometimes a person is criminally, though not civilly, liable for what he has written. This is frequently the case when the matter of the libel is true. It is a clearly established rule, that in a civil action the truth of the matter is a good defence; whereas in a criminal proceeding it does not amount to a defence unless it be proved that it was for the public benefit that the matter should be published. The gist of the crime is the provocation to a breach of the peace by exciting feelings of revenge, &c. And the libel is not divested of this characteristic on account of its being founded on truth. However, even in a criminal proceeding, the truth may be inquired into, and the court in pronouncing sentence may consider whether the guilt of the defendant is aggravated or mitigated by the plea and evidence of the truth (e).

proceedings is the same, namely, "The public mischief which libels are calculated to create, in alienating the minds of the people from religion and good morals, rendering them hostile to the government and magistracy of the country, and where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the peace." 3 Russ. 177; Starkie on Libel, 586.

(e) 6 & 7 Vict. c. 96, s. 6 (Lord Campbell's Act). The question of the truth of the libel cannot be investigated before the magistrate, but only on plea at the trial. *R. v. Carden*, L. R. 5 Q. B. D. 1; 49 L. J. (M.C.) 1.

We have just remarked that whenever an action will lie for a libel without laying special damage, an indictment will also lie. We may add that whenever an action will lie for verbal slander without laying special damage an indictment will lie for the same words if reduced to writing and published. Thus, to see what writings are indictable, we may first enumerate the cases in which an action will lie without laying special damage (*f*):—

i. For all words spoken of another which impute to him the commission of a crime punishable by law.

ii. For all words spoken of another which may have the effect of excluding him from society; for example, to say that he has the leprosy.

iii. For writing and publishing anything which renders another ridiculous or contemptible. But this must be taken with a certain amount of qualification; for a person will not be indictable for a literary criticism, though it makes the author appear ridiculous, if it does not exceed the limits of a fair and candid criticism by attacking the personal character of the author (*g*).

iv. For words used of a man which may impair or hurt his trade or livelihood; for example, to call a physician a quack.

Certain other writings are libellous. Such are those which vilify the character of deceased persons, if the intention has been to bring contempt on the families, or to stir up hatred against them, or to excite them to a breach of the peace (*h*). So also writings tend-

(*f*) Arch. 917.

(*g*) *Macleod v. Wakeley*, 3 C. & P. 311.

(*h*) *R. v. Topham*, 4 T. R. 126.

ing to defame persons of position in foreign countries. Writings, though they do not reflect on the character of any particular individual, as, for example, on bodies of men, may be libellous if they tend to a breach of the peace, or to stir up hatred towards a class generally (i).

When an indictment will not lie.

Privileged communications.

There are certain exemptions from the criminal liability which attaches to matter which is *prima facie* libellous. We have already seen that a fair literary criticism, however uncomplimentary and unpalatable, is not a libel. Confidential communications are also in some cases privileged; for example, by or to those occupying fiduciary positions, as where the defendant wrote to the *employees* of the plaintiff to inform them of the malpractices of the latter (j), or when a master gives what he believes to be a correct character of his servant (k). Communications made *bona fide*, with a view of investigating a fact, though injurious to a person's character, are not libellous; for example, an advertisement to ascertain whether the plaintiff had another wife living (l). The meaning in law of a *privileged communication* is, a communication made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff. But he may answer by proving malice in fact (m).

Indictable slander.

It constitutes a more serious offence to embody the objectionable matter in writing, than merely to give verbal utterance to it. So that an indictment (so also an action) may be maintained for words written, for which an indictment could not be maintained if they were merely spoken; for example, to write that

(i) *R. v. Osborn*, 1 Barn. K. B. 138, 166.

(j) *Cleaver v. Senande*, 1 Camp. 268, n.

(k) *Edmondson v. Stevenson*, Bull. N. P. 8.

(l) *Delaney v. Jones*, 4 Esp. 191.

(m) *Wright v. Woodgate*, 2 C. M. & R. 573.

a man is a swindler (n). It may be stated generally on the subject of *indictable slander* (o), that no words spoken, however scurrilous, even though spoken personally to an individual, are the subject of indictment unless they directly tend to a breach of the peace; for example, by inciting to a challenge. We must here except words seditious, blasphemous, grossly immoral, or uttered to a magistrate while in the execution of his duty.

As to the *form* in which the libel is expressed, of ^{Form of a libel} course it will be none the less an offence because the libellous imputation is conveyed indirectly; for example, by a hint, question, exclamation, irony, &c. And a mere subterfuge, as by writing only a letter or two of the name, will not avail if there be satisfactory evidence of what person is meant. The words used are to be taken in the sense ordinarily understood. Where the libellous signification of the words does not appear on the face of the libel, innuendoes are inserted in the indictment, and proved by the evidence shewing the intended application of the words.

As to the *publication*, or making public of the libel. ^{Publication.} To make a writing a libel it must be published: for the mere writing or composing of a defamatory paper which is never read or divulged to others, or which is delivered simply by mistake, will not amount to a libel. But, on the other hand, a slight circumstance will be sufficient to constitute a publication. Thus communication, though only to a single person, is a publication; and though it be contained in a private letter. We have only to recur to the gist of the offence to understand the reason of this; for in each case the act tends to a breach of the peace.

(n) *FAnson v. Stuart*, 1 T. R. 748.

(o) "Libel" is the term applied to words written. "Slander" to those merely spoken.

Criminal
intention.

The mere publication of matter which on the face of it is libellous is presumptive evidence of the malice which is necessary to constitute a crime; and therefore the proof of innocence of intention lies on the defendant. But if the writing is *prima facie* innocent, malice may be proved from special circumstances which may be laid before the jury.

The facts to be established by the prosecution are:—

- (a.) The making and publishing of the writing.
- (b.) That the writing is libellous in its nature.

Fox's Act.

For a long period it was maintained by the judges and others that it was the province of the jury to deal with the first of these questions only, and that the second was to be determined by the court. But the controversy was settled by Fox's Act (*p*), which declared and enacted that it was for the jury to determine both questions. So that the jury now give a verdict of Guilty and Not Guilty on the whole matter in issue, and are not, as formerly, directed by the court to find the defendant guilty if they are satisfied that the writing was published and bore the meaning ascribed to it in the indictment (*q*). But of course the court may state its opinion to the jury, though they are not bound to act upon it.

Who are
criminally
responsible.

Every one who is concerned in the writing or publishing is liable to conviction for the libel. This doctrine has been carried to an absurd extent; so much so that it was held that a mere servant of the printer of a libel, who clapped down the press, was punishable, though it did not at all clearly appear that

(*p*) 32 Geo. 3, c. 60.

(*q*) As the law is now administered, it is a system of *ex post facto* legislation, applied by the jury to each particular case. A libel considered as a crime has been well described as anything for having written which a jury thinks a man ought to be punished. Fitz. St. 147.

he knew the import of the paper, or that he was conscious he was doing anything illegal (*r*). But this rule has been doubted, though it shews that the court is prepared to go a long way.

The proprietor of a newspaper, or other principal, is answerable criminally as well as civilly for the acts of his servant in the publication of a libel (*s*). It would be exceedingly dangerous to hold otherwise; for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether (*t*). However, it is now provided that the defendant, principal or agent, may prove that the publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part (*u*). Though the statute does not expressly say whether this is a complete defence, or only serves to mitigate punishment, it seems that it will completely rebut the *prima facie* presumption of publication.

A report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report is fair and accurate and published without malice, and if the publication of the matter complained of is for the public benefit; but this protection will not be allowed to a defendant who has refused to insert in the newspaper in which the libel appeared, a reasonable explanation or contradiction (*v*).

Libel is a misdemeanor, punishable in the case of Punishment.

(*r*) *R. v. Clark*, 1 Barn K. B. 304.

(*s*) *R. v. Almond*, 5 Burr. 2686.

(*t*) *Per Tenterden, C. J., R. v. Gutch*, Moo. & M. 433.

(*u*) 6 & 7 Vict. c. 96, s. 7 (Lord Campbell's Act).

(*v*) 44 & 45 Vict. c. 60, s. 2.

one who publishes a defamatory libel, knowing it to be false, by imprisonment not exceeding two years, and fine (*w*). But if the prosecution do not prove that the defendant knew it to be false, the punishment is fine or imprisonment not exceeding one year, or both (*x*). No criminal prosecution can be commenced against any proprietor, publisher, editor, &c., for any libel published in any newspaper without the written fiat or allowance of the Director of Public Prosecutions, or of the Attorney-General. A court of summary jurisdiction may now inquire as to the libel being true or for the public benefit, &c. (*y*).

Costs.

In case of private prosecutions, if judgment is given for the defendant, he is entitled to recover his *costs* from the prosecutor. And if the defendant has pleaded a justification of the libel (on the ground of truth, &c.), and so has put the prosecutor to extra expense, on his (the defendant) failing to establish his plea, the prosecutor can recover from him the cost occasioned by such plea (*z*).

Hanging, &c.,
in effigy.

An offence which may be regarded as a particular form of libel is punishable in the same way, namely, hanging a person in effigy. The object is to bring contempt upon, or excite indignation against, an individual, and so to incite to a breach of the peace.

Another offence connected with libel may be noticed : Publishing, or threatening to publish, or proposing to abstain or prevent from publishing, a libel in order to extort money or some other valuable thing, is a

(*w*) 6 & 7 Vict. c. 96, s. 4.

(*x*) Ibid. s. 5.

(*y*) 44 & 45 Vict. c. 60, s. 3.

(*z*) 6 & 7 Vict. c. 96, s. 4.

misdemeanor punishable by imprisonment not exceeding three years (a).

FORCIBLE ENTRY OR DETAINER.

The violent taking, or, after unlawful taking, the violent keeping possession of lands and tenements with menaces, force, and arms, and without the authority of the law. It is no defence to a charge of forcible entry that the accused has been unjustly turned out of possession (b), inasmuch as he has his remedy at law, and the fact of his right does not diminish the breach of the peace. If there be not employed such force as is calculated to prevent resistance, it is a mere trespass (c).

Forcible entry
or detainer.

The offence is a misdemeanor, punishable by fine and imprisonment. The court may summarily restore possession to the person entitled, by a writ of restitution (d).

Blackstone notices certain other offences which are punishable by fine and imprisonment as misdemeanors against the peace: Riding or going armed with dangerous or unusual weapons—spreading false news—false and pretended prophecies, with intent to disturb the peace.

Other offences
against the
peace.

(a) 6 & 7 Vict. c. 96, s. 3.

(b) 5 Rich. 2, c. 8.

(c) *R. v. Smyth*, 5 C. & P. 201.

(d) v. 21 Jac. 1, c. 15.

CHAPTER VI.

OFFENCES AGAINST PUBLIC TRADE.

Nature of
offences
against trade.

IT is in subjects treated of in this chapter, perhaps, that there is found the chief ground for the distinction between *mala in se* and *mala quia prohibita*. Certain of the offences, free from any tinge of immorality, appear in the category of crimes only inasmuch as they have been forbidden by human laws. But, of course, in any case, an act is punishable by the law only in virtue of its being a breach of that law, and not on account of its moral quality.

SMUGGLING.

Definition of
smuggling.

Smuggling is the importing or exporting either (a) goods without paying the legal duties thereon; or (b) prohibited goods. The existing law on the subject is contained chiefly in the Customs Consolidation Act, 1853 (e).

Forfeiture, &c.

The statute subjects to forfeiture the goods which have in any way been the subjects of smuggling practices (f). It also imposes certain pecuniary penalties (g), and renders liable to imprisonment for specified periods, on summary conviction before a justice, every person found on board a ship liable to forfeiture by any Act relating to the customs (h). The following offences are declared felonies:—

(a.) Being armed and assembled, to the number of

(e) 16 & 17 Vict. c. 107.

(f) Ibid. s. 209.

(g) Ibid. s. 232.

(h) Ibid. s. 235.

three or more, for the purpose of aiding in the illegal landing, running, or carrying away of prohibited goods, or goods liable to duties not paid or secured; or in rescuing such goods after seizure; or in rescuing a person apprehended for a felony against the customs; or in preventing the apprehension of such person (i). Acts of smuggling which are felonies.

(b.) Shooting at vessels belonging to the navy or revenue service within a hundred leagues of any part of the United Kingdom, or shooting at or wounding an officer engaged in the prevention of smuggling (j).

The punishment for these felonies is penal servitude from fifteen years to life, or imprisonment not exceeding three years.

(c.) Being found in company with more than four others, with prohibited goods; or in company with one other person, within five miles of the sea coast or of any navigable river, carrying offensive arms, or disguised in any way—is punishable by penal servitude to the extent of seven years (k).

The following offences are misdemeanors:—

Misdemeanors.

(a.) Assaulting or opposing an officer engaged in the prevention of smuggling in the execution of his duty, is punishable by penal servitude to the extent of seven years (l).

(b.) Making signals, under certain circumstances, to smuggling vessels, is punishable by fine of £100, or imprisonment not exceeding one year (m).

All proceedings for offences against Acts relating to Proceedings.

(i) 16 & 17 Vict. c. 107, s. 248.

(j) Ibid. s. 249.

(k) Ibid. s. 250.

(l) Ibid. s. 251.

(m) Ibid. s. 244.

the customs must be commenced within three years after the date of the offence (*n*).

The Act also contains provisions for facilitating the discovery of smuggled goods by searching suspected ships, carts, houses, &c.; it being lawful for the revenue authorities to fire on a ship which, when chased, does not bring to (*o*).

OFFENCES AGAINST THE BANKRUPT LAWS.

Offences by
bankrupts, &c.

The Debtors Act, 1869 (*p*), enumerates several acts which, if done by persons adjudged bankrupt, or whose affairs are liquidated by arrangement, are misdemeanors punishable by imprisonment not exceeding two years. The following acts, if done fraudulently, are the chief (*q*):—

i. Not to best of belief making full discovery of his estate to the administering trustee.

ii. Neglecting to deliver up property under his control.

iii. Neglecting to deliver up books, papers, &c., relating to his property.

iv. Within four months before commencement of bankruptcy or liquidation, or thereafter, concealing property to the value of £10.

v. Within the same time, or thereafter, removing property to the value of £10.

vi. Making material omissions in statements relating to his affairs.

(*n*) 16 & 17 Vict. c. 107, s. 303.

(*o*) Ibid. ss. 218–223.

(*p*) 32 & 33 Vict. c. 62.

(*q*) Ibid. s. 11. The discovery mentioned in sub-section 1 of this section is not restricted to property in possession of the bankrupt at the commencement of his bankruptcy. *Reg. v. Michell*, 50 L. J. (M.C.) 76; 43 L. J. N. S. 572.

vii. Failing for a month to inform the trustee of any false debt which he knows to have been proved.

viii. After the commencement of bankruptcy or liquidation proceedings preventing the production of papers, &c., relating to his affairs, with intent to conceal the state of his affairs, or to defeat the law.

ix. After such commencement, or within four months before, destroying, falsifying, &c., such documents.

x. Within the same limits of time making false entries in such documents, &c.

xi. Within the same limits parting with, altering, or making omissions in such documents.

xii. Within the same limits attempting to account for any part of his property by fictitious losses or expenses.

xiii. Within four months before the commencement of proceedings obtaining, by false representation or other fraud, any property on credit without paying for it.

xiv. Within the same time, as a trader, so obtaining property on credit under the false pretence of carrying on his business.

xv. Within the same time pawning or disposing of, otherwise than in the ordinary way of trade, property obtained on credit and not paid for.

xvi. Any false representation or other fraud in order to obtain the consent of any of his creditors to an agreement with reference to his affairs, or his bankruptcy or liquidation.

One offence is a felony, punishable by imprisonment not exceeding two years, namely, after the commencement of bankruptcy or liquidation, or within four months before, fraudulently absconding or attempting

Absconding,
&c., a felony.

to abscond from England with property of his own to the value of £20 (r).

Offences tending to defraud creditors.

Certain other offences are misdemeanors, punishable by imprisonment not exceeding one year :—

For any person—

i. In incurring a debt or liability, to obtain credit under false pretences, or by means of any other fraud.

ii. With intent to defraud any creditor, to make any gift, delivery or transfer of, or any charge on his property.

iii. With like intent to conceal or remove any part of his property since or within two months before the date of any unsatisfied judgment or order for money obtained against him (s).

It is also a misdemeanor, punishable in the same way, for a creditor wilfully and fraudulently to make a false claim (t).

All these misdemeanors fall within the provisions of the Vexatious Indictments Act (u).

Prosecution ordered by the court.

Any court exercising jurisdiction in bankruptcy, on receiving the opinion of a trustee that the bankrupt has been guilty of an offence under the Act (the Debtors Act, 1869), or on the representation of a creditor or member of the committee of inspection that there is reasonable ground to believe him so guilty, shall, if there is reasonable probability of the bankrupt being convicted, order the trustee to prosecute (v).

Arrest of a debtor.

It may not be out of place to mention the cases in which a debtor may be arrested. The court may order

(r) 32 & 33 Vict. c. 62, s. 12.

(s) Ibid. s. 13.

(t) Ibid. s. 14.

(u) Ibid. s. 18, v. p. 344.

(v) Ibid. s. 16. See also *R. v. Rowlands*, 8 Q. B. D. 530; 46 L. T. N. S. 286.

such arrest, and the seizure of any books, papers, moneys, goods, and chattels in his possession, under the following circumstances :—

i. If, after petition of bankruptcy, there is probable reason to believe that he is about to go abroad, or quit his residence, with a view to avoid service of the petition or otherwise to delay proceedings ;

ii. Or that he is about to remove or conceal his goods.

iii. If, after adjudication in bankruptcy, he removes goods above the value of £5, or fails to attend any examination ordered by the court (*w*).

And now, even before a petition of bankruptcy has been presented, as soon as a debtor's summons has been served he may be arrested if he is about to go abroad so as to avoid payment, or avoid proceedings (*x*).

COUNTERFEITING TRADE-MARKS.

This subject seems peculiarly to fall within a chapter dealing with offences against trade, though it would also find a place under the heading "Forgery." The law as to offences relating to trade-marks is contained in the Merchandise Marks Act, 1862 (*y*). Offences relating to trade-marks.

Forging (additions to, and alterations of trade-marks, with intent to defraud, as well as fresh fabrications, being deemed forgeries) (*z*) a trade-mark, or falsely applying any trade-mark with intent to defraud (*a*), or (ii.), with like intent, applying a forged trade-mark to any bottle, case, wrapper, ticket, &c., in which any article is intended to be sold (*b*), is a misdemeanor.

(*w*) 32 & 33 Vict. c. 71, s. 86.

(*x*) 33 & 34 Vict. c. 76.

(*y*) 25 & 26 Vict. c. 83.

(*z*) Ibid. s. 5.

(*a*) Ibid. s. 2.

(*b*) Ibid. s. 3.

punishable by imprisonment not exceeding two years, or by fine, or both (*c*).

The articles to which the trade-mark is applied, and the instruments by which applied, are to be forfeited. No proceedings are to be taken after three years from the offence, or one from the first discovery (*d*).

Selling goods having forged trade-marks thereon, knowing them to be forged, is an offence punished by a pecuniary penalty (*e*).

Other offences against trade, *e.g.*, False Pretences, Embezzlement, Cheating, &c., may more conveniently be treated of under the title "Offences against Property." One class only of offences remains to be noticed here, and that a somewhat complex and comprehensive one.

UNLAWFUL INTERFERENCE WITH TRADE BY COMBINATIONS, ETC.

Right of combination, how far it may be exercised.

It is perfectly legal for workmen to protect their interests by meeting or combining together, or forming unions, in order to determine and stipulate with their employers the terms on which only they will consent to work for them. But this right to combine must not be allowed to interfere with the right of those workmen who desire to keep aloof from the combination, to dispose of their labour with perfect freedom as they think fit (*f*). Nor must it interfere with the right of

(*c*) 25 & 26 Vict. c. 88, s. 14.

(*d*) Ibid. s. 18.

(*e*) Ibid. s. 4.

(*f*) "The workmen who think it for their advantage to combine together in the disposal of their labour are no more justified in constraining any other workman, who does not desire such association, to combine with them—to bring his labour into common stock, as it were, with theirs—than an association of capitalists in constraining an individual capitalist to bring his capital into common stock with theirs."—Report of the Roy. Com. on Labour Laws, 1867.

the masters to have their contracts duly carried out. Infraction of such rights will bring the wrongdoer within the pale of the criminal law of conspiracy.

The law on this subject is principally contained in the Conspiracy and Protection of Property Act, 1875 (*g*). It will be well to prefix a provision of the Trades Union Act, 1871 (*h*). The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

The following acts are forbidden, and are punishable on summary conviction or indictment, by imprisonment not exceeding three months, or penalty not exceeding $\pounds 20$. Acts of unlawful interference which are punishable.

i. For *any* (*i*) person, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing—to wrongfully and without authority

- (a.) Use violence to, or intimidate, such other person, or his wife, or children, or injure his property.
- (b.) Persistently follow him about from place to place.
- (c.) Hide his tools, clothes, or other property, or hinder him in the use thereof.
- (d.) Watch or beset his house, or other place where he resides, or works, or carries on business, or happens to be, or the approach thereto (commonly known as "picketing"), but not if

(*g*) 38 & 39 Vict. c. 86, repealing 34 & 35 Vict. c. 32 and other Acts.

(*h*) 34 & 35 Vict. c. 31, s. 2.

(*i*) This word makes the law of general application, and not restricted to trade disputes, though, of course, practically the offence will most frequently occur in connection therewith.

the object be merely to obtain or communicate information.

- (e.) Follow him, with two or more other persons, in a disorderly manner in or through any street or road (*j*).

Acts causing failure of gas or water.

ii. For a person employed by the municipal authorities, public companies, contractors, or others who have undertaken to supply gas or water, either alone or with others, wilfully and maliciously to break his contract of service, knowing or having reasonable cause to believe that the probable consequence will be to deprive the inhabitants wholly or to a great extent of gas or water (*k*).

Acts endangering life, &c.

iii. For a person wilfully and maliciously to break his contract of service, knowing or having reason to believe that the probable consequence will be to endanger human life, or cause serious bodily injury, or expose valuable property to destruction or serious injury (*l*).

Procedure.

An exceptional course in criminal procedure is allowed in the case of the last two offences, namely, that on the hearing of an indictment or information for such offences, the respective parties to the contract of service, their husbands or wives, are considered competent witnesses (*m*). There is also another peculiarity with regard to the proceedings. Power is given to the offender to elect to have the case tried on indictment, and not by a court of summary jurisdiction (*n*).

(*j*) 38 & 39 Vict. c. 86, s. 7.

(*k*) Ibid. s. 4.

(*l*) Ibid. s. 5.

(*m*) Ibid. s. 11. For another instance of this innovation, v. p. 147.

(*n*) Ibid. s. 9. "Making the fact of whether a particular offence is indictable or not depend on the will of the accused person, is a novelty in our jurisprudence, and, to say the least, productive of considerable practical inconvenience."—Davis' Labour Laws, p. 99.

Trade disputes now form an exception to the general law of conspiracy in one point. If, in connection with such dispute, two or more combine to do something which if done by one person is not punishable as a crime, they will not, on account of their number, be indictable for the conspiracy at common law (o). Trade disputes and conspiracy.

It may be mentioned that assaults with intent to obstruct the sale of grain, or its free passage, or with force hindering any seaman, keelman, or caster from working at his lawful occupation, or beating or using violence with such intent, is punishable, on summary conviction, by imprisonment not exceeding three months (p). Obstructing sale of grain &c.

(o) 38 & 39 Vict. c. 86, s. 3.

(p) 24 & 25 Vict. c. 100, ss. 39, 40.

CHAPTER VII.

CONSPIRACY.

Definition of
conspiracy.

CONSPIRACY is a combination of two or more persons to do an unlawful act, whether that act be the final object of the combination, or only a means to the final end,—and whether that act be a crime, or an act hurtful to the public, a class of persons, or an individual.

The term conspiracy is divisible into three heads; first, where the end to be attained is in itself a crime; second, where the object is lawful, though the means to be resorted to are unlawful; third, where the object is to do an injury to a third party, or a class; though, if the wrong were inflicted by a single individual, it would be a wrong and not a crime (*q*).

The agreement
or combination
the gist of the
offence.

The gist of the offence is the *combination* (*r*). Of this offence a single person cannot be convicted, unless, indeed, he is indicted with others, who may, however, be dead or unknown to the jurors (*s*). And, on the same ground, man and wife cannot by themselves be convicted, for they are one person. Many acts innocent if done by one person, become criminal if they are the result of agreement by two or more persons. Thus A. and B. each commit adultery under the same circumstances, the most aggravated and cruel. B.'s conduct differs from A.'s only in the fact that he gets C. to lend

(*q*) *R. v. Parnell*, 14 Cox, 508.

(*r*) "The law of conspiracy is the most complete illustration of the fiction consisting in treating as a crime not the very acts which are intended to be punished, but certain ways of doing them."—Fitz. St. 62.

(*s*) 1 Hawk. c. 72, s. 8.

him a carriage for the purpose of elopement. A is not, B. is, within the grasp of the criminal law (*t*). We have just remarked that the gist of the offence is the agreement. A mere intention will not suffice to constitute the crime (*u*). But if the agreement (the conspiracy itself) can be proved, there is no need to prove that anything has been done in pursuance of it. Of course, the existence of the unlawful agreement is generally evidenced by some overt acts, but these are evidence merely, and not material if the agreement can be proved otherwise (*v*).

The definition shews a conspiracy to be an agreement to do an *unlawful* act. It is the indefinite meaning of this word "unlawful" that gives to the crime of conspiracy its wide extent. The widest discretion is intrusted to the judges, in whose power it seems to be thus to declare criminal combinations to do almost anything which they regard as morally wrong, politically or socially dangerous, or otherwise objectionable (*w*). Three classes of conspiracy may be distinguished (*x*):—

1. When the end to be accomplished would be a *crime* in each of the conspiring parties; in other words, a conspiracy to commit a crime. The case of murder is specially provided for by statute; the person con-

Indefinite
nature of the
crime.

Conspiracies
classified
according to
their objects.

(*t*) "It is not apparent, at first sight, why conspiracy, which is one out of many possible aggravations of an act, should have been selected as the one by which its criminal character should be determined. . . . The probable explanation is, that in early times the most prominent conspiracies were usually attended with great violence, and that, in defining the crime, words were used which included offences of much less importance than those which were originally contemplated."—Fitz. St. 62.

(*u*) *Mulcahy v. R.*, L. R. 3 H. L. Ap. Ca. 306.

(*v*) *R. v. Gill*, 2 B. & Ald. 204.

(*w*) "It is not altogether inconvenient to have a branch of the law which enables the Courts, by a sort of ostracism, to punish people who make themselves dangerous or obnoxious to society at large, and the necessity for quoting precedents—the publicity of the proceedings—and the general integrity of the judges, are probably sufficient safeguards against its abuse, but it would be idle to deny that the power is dangerous, and ought to be watched with jealousy."—Fitz. St. 149.

(*x*) See Final Report of Roy. Com. on Labour Laws.

spiring being liable to penal servitude to the extent of ten years (*y*). And by the same statute one who solicits, encourages, persuades, or endeavours to persuade, or proposes to any person to murder any other person, is liable to the same punishment (*z*). Such an offence is completed by the publication of an article in a newspaper, although not specifically addressed to any one person (*a*).

2. When the ultimate purpose of the conspiracy is lawful, but the means to be resorted to are criminal, or at the least, illegal; in other words, to effect a legal purpose with a corrupt intent or by improper means—for example, to support a cause believed to be just by perjured evidence; to break into another's house, in order to obtain one's own property.

We have already noticed the case of trade conspiracies, and referred to an exception to the common law doctrine in such matters (*b*).

3. Where, with a malicious design to do an injury the purpose is to effect a wrong, though not such a wrong as when perpetrated by a single individual, would amount to an offence against the criminal law. We may distinguish the following cases:—

(*a*.) Falsely to charge another with a crime—whether from malicious and vindictive motives, or to extort money from him. But, of course, two or more persons may agree to prosecute a person against whom there are reasonable grounds of suspicion.

(*y*) 24 & 25 Vict. c. 100, s. 4.

(*z*) *Ibid.* s. 4.

(*a*) *R. v. Most*, 7 Q. B. D. 244; 50 L. J. (M.C.) 113; 44 L. T. N. S. 423; 29 W. R. 759.

(*b*) v. pp. 126, 128.

(b.) To do an act with intent to pervert the course of justice, for this is an injury to the public at large—for example, when two or more agree together that one of them shall be robbed by the others, in order that they may obtain the statutory reward for conviction (c).

(c.) *Generally*—Wrongfully to injure or prejudice others, whether an individual, a body of men, or the public, in any other manner. The varieties of this offence are innumerable, but two or three examples will suffice: To injure a man in his trade; to raise the price of the public funds by false rumours; to violate morality and public decency by inducing a woman to become a common prostitute (d). But it is said that not every combination to effect a tort is criminal; that wherever a combination to commit a civil injury has been held criminal, the injury has been malicious (using the term in the non-technical sense)—for example, a combination to pull down a fence would not be criminal, if the only object of the act were to try a question as to the right of way (e).

Conspiracy is a misdemeanor, punishable by fine or imprisonment, or both; in the case of conspiracy to murder by penal servitude to the extent of ten years (f). This crime falls under the provision of the Vexatious Indictments Act (g).

If the purpose of the conspiracy is a felonious one and *actually carried out*, the conspiracy is merged in the felony; so that after a conviction for the felony the defendant cannot be tried for the conspiracy. But if the defendant is indicted for the conspiracy, he is not

Merger of conspiracy in the felony.

(c) *R. v. Macdaniel*, 1 Leach, 45.

(d) *v. Arch.* 1007 for other instances.

(e) *Rosc.* 417.

(f) *v. supra.*

(g) *v. p.* 359.

entitled to an acquittal, because the facts shew a felony. Under such circumstances, however, he cannot be subsequently tried for the felony unless the court has discharged the jury from giving a verdict on the misdemeanor (*h*).

(*h*) 14 & 15 Vict. c. 100, s. 12.

CHAPTER VIII.

OFFENCES AGAINST PUBLIC MORALS, HEALTH, AND
GOOD ORDER.

UNDER this head will be noticed a somewhat miscellaneous class of offences which are considered to affect the public rather than the individual; though some of them at first sight appear rather to concern particular persons, *e.g.*, bigamy. Throughout the whole of the criminal law there can be traced an unwillingness to resort to anything characteristic of paternal government. As a rule, mere immorality is not punished until it invades the rights of others than those who participate in it, whether by public evil example or otherwise. Thus a mere falsehood is not punishable; but if it involves a fraud on another, then the law steps in with its punishments.

Morality and
the criminal
law.

BIGAMY.

The offence consists in marrying a second time, while the defendant has a former husband or wife still living.

Not only is the second marriage void, but it also constitutes a felony; and this whether the second marriage took place in the United Kingdom or elsewhere. There are certain cases which are excepted by the statute which declares the second marriage generally felonious:—

Where the
second mar-
riage is not
felonious.

i. A second marriage contracted elsewhere than in England or Ireland by any other than one of Her Majesty's subjects.

ii. A second marriage by one whose husband or wife has been continually *absent* from such person for the last seven years, and has not been known by such person to be living within that time. But if there is no proof that the husband and wife had ever separated, the prosecution is not bound to prove that the prisoner knew that his wife was alive within six years of the second marriage (*i*).

iii. A second marriage by one who, at the time of such second marriage, was *divorced* from the bond of the first marriage.

iv. A second marriage by a person whose former marriage has been declared void by the sentence of any court of competent jurisdiction (*j*).

In none of these cases is the second marriage a felony; but in the second case it is a mere nullity.

It is no defence to the charge of bigamy that the subsequent marriage would in any case have been void, as for consanguinity and the like (*k*). But if the first marriage is void, the second will not be bigamous; otherwise if voidable only (*l*). It has been recently settled that a *bond fide* belief by the prisoner at the time of the second marriage that her husband was then dead is no defence (*m*).

The first (*i.e.*, the real) wife or husband is not a competent witness either for or against her or his consort; but of course the (so-called) second wife or husband is.

Punishment.

This felony is punishable by penal servitude to the

(i) *R. v. Jones*, 11 Q. B. D. 118; 52 L. J. (M.C.) 96; 48 L. T. N. S. 768; 31 W. R. 800. See also *R. v. Willshire*, 14 Cox, 541.

(j) 24 & 25 Vict. c. 100, s. 57.

(k) *R. v. Allen*, L. R. 1 C. C. R. 376; 41 L. J. (M.C.) 101.

(l) *R. v. Jacobs*, 1 Mood. C. C. 140.

(m) *R. v. Gibbons*, 12 Cox, 237.

extent of seven years. The man (or woman) who goes through the form of marriage with the bigamist does not altogether escape. He may be indicted as principal in the second degree, having been present aiding and assisting the woman in committing the felony; or at any rate as an accessory before the fact for counselling her to commit the crime (*n*) (*o*).

INDECENT CONDUCT.

To this head may be referred the public and indecent exposure of the person, which may be treated as a common nuisance. Also the exposing for public sale or view any obscene book, print, picture, or other indecent exhibition. Both of these offences are misdemeanors, and punishable by fine or imprisonment, or both (*p*). Power is given to magistrates, under certain circumstances, to authorize the searching of houses and other places in which obscene books, &c., are suspected to be sold or otherwise published for gain, and to authorize their seizure and destruction (*q*).

Indecent conduct, when criminal.

GAMING AND GAMING HOUSES.

The law does not deem it within its province to punish such practices as gaming, unless either some fraud is resorted to, or regular institutions are established for the purpose, so as to amount to a public nuisance.

As to *Gaming*.—If any person by fraud or unlawful Gaming.

(*n*) *R. v. Brown*, 1 C. & K. 144.

(*o*) There are certain other offences connected with marriage. By 4 Geo. 4, c. 76, s. 21, and 6 & 7 Wm. 4, c. 85, ss. 39, 41, persons unduly solemnizing marriages are guilty of felony. Making false declarations, signing false notices or certificates of marriage, &c., are offences attended by the penalties of perjury, 6 & 7 Wm. 4, c. 85, s. 38. As to forging marriage licenses, v. "Forgery." As to Abduction, &c. v. p. 184.

(*p*) 14 & 15 Vict. c. 100, s. 29.

(*q*) 20 & 21 Vict. c. 83. As to Indecent Assaults, v. p. 181. Disorderly Houses, &c., v. p. 142.

device, or ill practice, in playing, betting, or wagering, win any sum of money or valuable thing, he is deemed guilty of obtaining money by false pretences, and punished accordingly (r).

Playing or betting by way of wagering or gaming in any street, road, highway, or other open and *public place*, or in any open place to which the public have access, at or with any table or instrument of gaming, or any card, token, or other article used as an instrument of wagering at any game or pretended game of chance, subjects the player to the punishments of 5 Geo. 4, c. 83 (s), as a rogue and vagabond; or else, at the discretion of the magistrate, to a penalty not exceeding 40s. for the first offence, and £5 for any subsequent offence (t). A railway carriage in transit where gaming is carried on is a "public place" or an "open place to which the public are permitted to have access" (u).

The subject of Lotteries will be considered under the head "Nuisances."

Gaming houses.

As to *Gaming Houses*.—Houses of this description are regarded as so detrimental to public morality and good order, that they are classed among public nuisances. As such, the keepers are guilty of a common law misdemeanor, and liable to fine or imprisonment, or both.

Legislation as to gaming houses.

The chief steps taken by the legislature to suppress the evils of gaming houses are the following. An early statute prohibited the keeping of any common house

(r) 8 & 9 Vict. c. 109, s. 17. Inducing one to go to a public-house and drink and toss for wagers, whereby such person lost his watch, is an offence within the meaning of this section. *R. v. O'Connor*, 45 L. T. N. S. 512.

(s) v. p. 145.

(t) 36 & 37 Vict. c. 38, s. 3.

(u) *Langrish v. Archer*, 10 Q. B. D. 44; 52 L. J. (M.C.) 47; 47 L. T. N. S. 548; 31 W. R. 183.

for dice, cards, or other unlawful games, under a penalty of forty shillings for every day and six and eightpence for every time of playing (*v*). Subsequent statutes included other games under heavier penalties (*w*). By a later statute (*x*) the statute of Henry VIII. is repealed as far as it prohibited bowling, tennis, or other games of mere skill. Further provision was also made by the Act of this reign against those who own or keep common gaming houses. The owner or keeper, and every person having the care and management of such house, and also every banker, croupier, and other person in any manner conducting the business of the house, is liable, on conviction before two justices, to a penalty not exceeding £500, in addition to the penalty under 33 Hen. 8; or may be committed to prison for a period not exceeding six months (*y*).

If any person who has been concerned in the unlawful gaming, on his examination as witness, makes true disclosure to the best of his knowledge, he is entitled to receive a certificate, and is free from all consequences of his unlawful act up to that time (*z*).

Betting houses, rooms, offices, or places, are deemed gaming houses within this statute. Persons receiving deposits on bets in such houses incur a penalty of £30, or imprisonment for three months. Exhibiting placards or handbills, or otherwise advertising betting houses, is punished by a penalty of £30, or imprisonment for two months (*a*). A wooden box in an enclosed space on a race-course, commonly known as "the Ring," is a betting place (*b*).

(*v*) 33 Hen. 8, c. 9, s. 11.

(*w*) See 9 Anne, c. 14; 12 Geo. 2, c. 28; 13 Geo. 2, c. 19; 18 Geo. 2,

(*x*) 8 & 9 Vict. c. 109, amended by 17 & 18 Vict. c. 38.

(*y*) 8 & 9 Vict. c. 109, s. 4.

(*z*) Ibid. s. 9.

(*a*) 16 & 17 Vict. c. 119.

(*b*) *Galloway v. Maries*, 8 Q. B. D. 275; 51 L. J. (M.C.) 53; 45 L. T. N. S. 763.

The fact that the entrance of a peace officer is obstructed or delayed, or that the place is found provided with means of gaming, or of concealing instruments of gaming, is evidence that the house is a common gaming house. Penalties are imposed for such obstructions and for certain other offences (c).

COMMON OR PUBLIC NUISANCES.

Nuisance, the term is indefinite.

Another offence of wide and vaguely-defined limits is now to be considered. In its definition its extent is indefinite, but in practice it is confined to certain classes of acts which interfere with the normal state of order and comfort.

Public and private nuisances distinguished.

Common nuisances are such annoyances as are liable to affect all persons who come within the range of their operation. They consist of acts either of commission or of omission, that is, causing something to be done which annoys the community generally, or neglecting to do something which the common good requires. Public nuisances are opposed to private nuisances, which annoy particular individuals only, that is, to which all persons are not liable to be exposed. The distinction is one based on the extent of the operation of the evil and not one relating to the class of evil; inasmuch as all kinds of nuisances which, when injurious to private persons, are actionable as private nuisances, when detrimental to the public welfare, are punishable on prosecution as public nuisances. It is for the jury to determine whether a sufficiently large number of persons are or may be affected so as to make the nuisance "common" or "public" (d).

Common nuisances not actionable.

Common nuisances are indictable as misdemeanors. They do not give rise to civil action by every one who

(c) 17 & 18 Vict. c. 38.

(d) *R v. White*, 1 Burr. 333.

is subjected to the common annoyance. But if any one can prove special damage, that is, that he is affected in some respect in a way in which the public generally are not, he may pursue his civil remedy and obtain damages.

Another course of proceeding is sometimes available Abatement. in nuisances, namely, *abatement* or removal of the nuisance by the party's own act. In private nuisances this is commonly allowed to be done by the party aggrieved; but in public nuisances the right is more confined. They may be abated by boards of health and other public bodies specially authorized under various public Acts (e); but private individuals cannot resort to this course if the abatement involves a breach of the peace; and in any case they can only interfere so far as is necessary to exercise the right of passing, &c.

The principal classes of public nuisances will be briefly noticed:—

i. Nuisances to *highways, bridges, and public rivers*.— Nuisances to highways, &c. These annoyances may be either *positive*, by actual obstruction; or *negative*, by want of reparation. In the latter case, only those persons are liable whose duty it is to keep the roads, &c., in repair. The former class consists of a variety of offences, for example, laying rubbish on the road, digging trenches in it, diverting part of a public river, &c.

ii. *Carrying on offensive or dangerous trades or manufactures*.— Offensive trades, &c. Manufactures which are injurious to the health or merely offensive to the senses are nuisances; and it is no defence that the public benefit outweighs the public annoyance (f). But if a noxious trade is already established in a place remote from habitations and public roads, and persons come and build near, or

(e) v. 38 & 39 Vict. c. 55.

(f) *R. v. Ward*, 5 L. J. (K.B.) 221.

a new road is made, the trade may be continued (*g*). The presence of other nuisances will not justify any one of them; but a person cannot be indicted for setting up a noxious manufacture in a neighbourhood in which other offensive pursuits have long been borne with, unless the inconvenience to the public is greatly increased (*h*). No length of time will legitimate this or other kinds of nuisances, but the consideration of time may sometimes concur with other circumstances to prevent the character of nuisance from attaching (*i*).

Nuisances which affect the public health are dealt with in the numerous statutes which treat of that subject.

Houses, as
nuisances.

iii. *Houses, &c., which interfere with public order and decency.*—The following places are nuisances, and, upon indictment, may be suppressed, and their owners, keepers, or ostensible managers punished by fine or imprisonment, or both—Disorderly inns (*j*) or alehouses; bawdy houses; gaming and betting houses (*k*); unlicensed or improperly conducted playhouses, booths, stages for dancers, and the like.

Prosecutions for keeping a bawdy house or gaming house fall within the provisions of the Vexatious Indictments Act (*l*).

Lotteries.

iv. *Lotteries.*—All lotteries were declared by statute (*m*) public nuisances. State lotteries were, however, authorized by successive Acts of Parliament until 1824,

(*g*) *R. v. Cross*, 2 C. & P. 483.

(*h*) *R. v. Neil*, 2 C. & P. 485; *v. R. v. Neville, Peake*, 91.

(*i*) *Weld v. Hornby*, 7 East, 199.

(*j*) If a traveller is refused entertainment without sufficient cause, the inn is liable to be treated as a disorderly inn.

(*k*) *v. p.* 137.

(*l*) *v. p.* 359.

(*m*) 10 & 11 Wm. 3, c. 17. See also 42 Geo. 3, c. 119, s. 2; and *Taylor v. Smetten*, 52 L. J. (M.C.) 100.

when they were discontinued, the State being thus enabled without inconsistency to enforce the already existing law against other lotteries.

v. A vast number of other Acts, &c., have been de- Miscellaneous
nuisances.
clared public nuisances; for example, exposing in a public thoroughfare persons afflicted with infectious disease; allowing mischievous dogs to go abroad unmuzzled, provided that, if they were not of a description to be generally dangerous, the owner was aware of their nature; keeping fierce animals in places open to the public; keeping hogs near a public street; keeping a corpse unburied; making great noises in the street at night; eaves-dropping, that is, "listening under walls or windows, or the eaves of a house, to hearken after discourse, and thereby to frame slanderous and mischievous tales;" common scolds; and in general anything which is an appreciable grievance to the public at large.

There are two cases at least where there might be a Who is liable.
doubt as to the person who is criminally responsible for a nuisance. The landlord is liable if he erects a building which is a nuisance, or the occupation of which is likely to produce a nuisance. The master or employer is liable for a nuisance caused by the acts of his servants if done in the course of their employment.

ADULTERATION AND UNWHOLESOME PROVISIONS.

Obviously there is no undue interference on the part of the State, when it characterizes as a crime the adulterating food or dealing in unwholesome provisions.

The law as to *adulteration* is contained chiefly in the Adulteration,
&c.
Sale of Food and Drugs Act, 1875 (n). Mixing, or

(n) 38 & 39 Vict. c. 63, which applies equally to the case of a purchase by a private individual under section 12 and by the public officer mentioned in section 13 of the Act. *Parsons v. The Birmingham Dairy Company*, 9 Q. B. D. 172; 51 L. J. (M.C.) 111; 30 W. R. 748.

ordering, or permitting other persons to mix, colour, &c., any article of food with any material injurious to health, with intent that the same may be sold in that state, is punishable for the first offence by a penalty of £50; the second offence is a misdemeanor, punishable by imprisonment not exceeding six months (o). The same consequences attend the adulteration of drugs, so as to affect injuriously the quality or potency of such drugs (p). In either case the person is excused if he can prove absence of knowledge. The defendant is discharged if he can prove that he bought the article in the same state as he sold it, with a warranty (q). Other punishments are prescribed for giving false warranties, false labels, forging certificates, or warranties, &c. (r).

WANTON AND FURIOUS DRIVING.

Furious
driving.

Any one having the charge of any carriage or vehicle, who, by wanton or furious driving or racing, or by wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to another, is guilty of a misdemeanor, and is liable to imprisonment not exceeding two years, or fine, or both (s).

VAGRANCY.

Vagrancy.

There are always in this country a great number of persons, belonging to the criminal class, against whom no particular offence can be proved, but whose conduct demands correction. The law punishes such as *vagrants*; taking care that mere misfortune or poverty does not place an innocent person in this class. The chief statute on the subject is 5 Geo. 4, c. 83, amended by 1 & 2 Vict. c. 38; other Acts rendering liable to

(o) 38 & 39 Vict. c. 63, s. 4.

(p) *Ibid.* s. 5.

(q) *Ibid.* s. 25.

(r) *Ibid.* s. 27.

(s) 24 & 25 Vict. c. 100, s. 35.

the punishments of these statutes those who evidence their culpability by certain kinds of conduct.

Persons of this character are divided into three classes:—1. Idle and disorderly persons; 2. Rogues and vagabonds; 3. Incurable rogues.

1. *Idle and Disorderly Persons*.—This class consists of such characters as the following:—(a) Persons becoming chargeable to the parish though able to work; (b) Those returning to a parish from which they have been removed; (c) Hawkers and pedlars wandering about and trading without licence; (d) Prostitutes behaving in public places in a riotous or indecent manner; (e) Beggars asking alms or causing or encouraging others to do so (t); (f) Insubordinate or disobedient paupers (u). Idle and disorderly persons.

The punishment, on conviction before a magistrate, is imprisonment for not exceeding one month (v).

2. *Rogues and Vagabonds*.—Under this designation fall (a) those who commit any of the above offences a second time. Also the following: (b) Persons pretending to tell fortunes, &c.; (c) Wandering about, lodging in a barn, in the open air, &c., not having any visible means of subsistence, and not giving a good account of themselves; (d) Publicly exposing to view obscene prints, &c.; (e) Publicly exposing their persons; (f) Exposing wounds or deformities in order to obtain alms; (g) Collecting alms or contributions under false pretences; (h) Running away and leaving wife or children chargeable to the parish; (i) Playing or betting in public (w); (k) Having in possession one Rogues and vagabonds.

(t) 5 Geo. 4, c. 83, s. 3.

(u) 34 & 35 Vict. c. 103, s. 7.

(v) 5 Geo. 4, c. 83, s. 3.

(w) 36 & 37 Vict. c. 38, v. p. 137.

or more of certain instruments with intent to commit a felonious act; (l) Being found in a dwelling-house, &c., for an unlawful purpose; (m) Suspected or reputed thieves visiting public places with intent to commit a felony; (n) Making violent resistance when apprehended by a peace officer as an idle, disorderly person, provided there be a conviction; (o) Acting contrary to directions of certificates given to persons discharged from prison under 5 Geo. 4, c. 83, s. 15 (x).

The punishment awarded by the magistrate is imprisonment not exceeding three months. In this case, and that of imprisonment as an idle and disorderly person, there is an appeal to the sessions (y).

Incorrigible
rogues.

3. *Incorrigible Rogues*.—To be dealt with as such are (a) Those who are convicted a second time of an act which makes the doer a rogue and vagabond; (b) Escaping out of a place of confinement before the expiration of the time for which they were committed under this Act; (c) Making violent resistance when apprehended by a peace officer as a rogue and vagabond, if subsequently convicted of the offence for which they were apprehended (z).

The magistrate may commit a person convicted as an incorrigible rogue to hard labour in the house of correction until the next sessions. By that court he may be imprisoned for a period not exceeding one year, with or without whipping, if a male (a).

(x) 5 Geo. 4, c. 83, s. 4.

(y) *Ibid.*

(z) *Ibid.* s. 5.

(a) *Ibid.* Though *drunkenness* is not an indictable offence, but only punishable on summary conviction, the subject may have a passing notice here. The mere fact of drunkenness is punishable by forfeiture of 5s. for the first offence; for the second the offender may be bound with two sureties in £10 for good behaviour (4 Jac. 1, c. 5; 21 Jac. 1, c. 7, s. 3). Persons found drunk in any street or public thoroughfare, building, or other place, or on any licensed premises, are liable to a penalty of 10s. for the first offence; 20s. and 40s. for the second and third within the twelve

SENDING UNSEAWORTHY SHIP TO SEA.

If a ship is sent to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, the following persons are guilty of a misdemeanor :—

Sending unseaworthy ship to sea.

(a) The person sending it; (b) the managing owner of any British ship so sent to sea from any port in the United Kingdom; (c) the person attempting to send it to sea; (d) the master of a British ship knowingly taking it to sea.

But the accused will not be deemed guilty if he proves in the former cases that he has used all reasonable means to ensure the ship being sent to sea in a seaworthy state, or proves that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable; in the last case, if he proves the latter of these points.

Defence.

In each case the accused may give evidence in the same manner as any other witness (b).

months. If, whilst drunk, a person is guilty of riotous or disorderly behaviour, or is in charge of any carriage, horse, cattle, or steam-engine, or is in possession of any loaded fire-arms, the penalty is 40s., or imprisonment for a month (35 & 36 Vict. c. 94, s. 12). The same Act contains penalties for permitting drunken conduct (v. 10 & 11 Vict. c. 89).

(b) 38 & 39 Vict. c. 88, s. 4; v. p. 404. The first trial at which the defendant was examined took place at the Liverpool Spring Assizes, 1876.

CHAPTER IX.

OFFENCES RELATING TO GAME.

Ground of
special legisla-
tion as to game
offences.

WITHOUT entering into a discussion as to the sufficiency of the ground on which the game laws are based, we proceed to treat of poaching and the attendant offences. We shall find hereafter that animals *feræ naturæ* (including game) in their live state are not the property of any one, and on this account are not the subjects of larceny. Therefore the legislature has made special provisions, in some cases more stringent than in the case of ordinary articles.

The principal statute on the subject is 9 Geo. 4, c. 69, amended by 7 & 8 Vict. c. 29 and 25 & 26 Vict. c. 114. The following are the chief offences:—

Taking, &c.,
game by night.

i. Any person by night (declared to commence one hour after sunset, and to conclude at the beginning of the last hour before sunrise) (c) unlawfully *taking* or *destroying* any game (hares, pheasants, partridges, grouse, heath or moor game, black game and bustards), or rabbits, in any land open or inclosed (d), or on public roads, highways, gates, outlets, openings between such lands and roads (e).

Entering, &c.,
for purpose of
taking.

ii. Any person *entering* or *being* by night in such places, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game (f). An

b (c) 9 Geo. 4, c. 69, s. 12.

(d) *Ibid.* s. 1.

(e) 7 & 8 Vict. c. 29, s. 1.

(f) 9 Geo. 4, c. 69, s. 1.

entry on land accompanied by greyhounds and beating bushes where hares were wont to frequent is not a trespass in pursuit of game (*g*).

The punishment for the *first* offence in each case Punishment. is imprisonment not exceeding three months, and at the expiration of such period to be bound over to good behaviour for a year, or, in default of sureties, further imprisonment not exceeding six months, or until such sureties be found. For the *second*, likewise summarily dealt with, each of the above periods is doubled. The *third* offence is a misdemeanor, punishable by penal servitude to the extent of seven years (*h*).

When any person is found committing such offence, Apprehension
of offender. it is lawful for the owner or occupier of the land (or in the case of a public road, &c., of the adjoining land), or for any person having a right of free warren or free chase therein, or for the lord of the manor, or for the gamekeeper or servant of such persons, or for any one assisting them, to apprehend the poacher. If the latter assaults or offers any violence with an offensive weapon to such persons, he is punishable for the misdemeanor with penal servitude to the extent of seven years (*i*).

A graver offence is dealt with in a later section of the same statute. For *three* or more persons, by night, to unlawfully enter, or be in any land (or road, &c., Three or more
armed for
purpose of
taking game. 7 & 8 Vict. c. 29), for the purpose of taking or destroying game or rabbits, any of the party being armed with firearms or other offensive weapons, is a misdemeanor in each, punishable by penal servitude to the extent of fourteen years (*j*).

(*g*) *Countess of Kingston v. O'Neill*, 14 Cox, 466.

(*h*) 9 Geo. 4, c. 69, s. 1.

(*i*) *Ibid.* s. 2.

(*j*) *Ibid.* s. 9.

The prosecution for every offence within this Act, if punishable on summary conviction, must be commenced within six months after the offence; if punishable by indictment or otherwise than by summary conviction, within twelve months (*k*).

Search for
game, guns,
&c.

Power is given to the police to search in public places persons suspected on reasonable grounds of coming from lands where they have been unlawfully in pursuit of game, and their carts, and to seize any game, guns, &c., which they may have in their possession. The persons so searched are to be brought before two magistrates assembled in petty sessions, and, if they are convicted, forfeit the goods and are fined not exceeding £5 (*l*).

Hares and
rabbits.

Unlawfully taking or killing *hares* or *rabbits* in warren by *night* is a misdemeanor; by *day*, an offence punishable on summary conviction (*m*).

Deer.

By the same statute, hunting, killing, &c., *deer* in an uninclosed part of a forest is punishable on the first offence by penalty not exceeding £50; on the second, which is a felony, by imprisonment not exceeding two years. The latter punishment applies to even a first offence, if committed in an inclosed part (*n*).

Spring-guns,
&c.

In connection with this subject we may notice that, although any innocent means may be employed to prevent game from being taken, and land from being trespassed on, it is criminal to adopt certain extreme measures. Setting a *spring-gun*, man-trap, or other engine calculated to destroy life or inflict grievous

(*k*) 9 Geo. 4, c. 69, s. 4.

(*l*) 25 & 26 Vict. c. 114, s. 2.

(*m*) 24 & 25 Vict. c. 96, s. 17.

(*n*) Ibid. ss. 12, 13.

bodily harm, with intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, is a misdemeanor punishable by penal servitude to the extent of five years. But this does not prevent setting a man-trap, &c., to protect a dwelling-house from sunset to sunrise (o).

(o) 24 & 25 Vict. c. 100, s. 31.

OFFENCES AGAINST INDIVIDUALS.

Offences
against indi-
viduals, why
crimes.

Offences which immediately affect individuals are regarded as crimes, and not merely as violations of private rights, on several grounds. First, because they are considered as contempts of public justice and the Crown ; secondly, because they almost always include in them a breach of the public peace ; thirdly, because, by their example and evil tendency, they threaten and endanger the subversion of all civil society (*p*).

Offences against individuals may be divided into two classes—those

Against their *Persons*.

Against their *Property*.

PART II.

OFFENCES AGAINST INDIVIDUALS.

THEIR PERSONS.

It is needless to remark that offences against the person vary considerably in their enormity and in their consequences. In this department especially anomalies occur, which are apparently productive of great inequality. It is here perhaps more than elsewhere that the interference of what may be termed "extraneous circumstances" determines the character and gravity of the offence. We have seen that the intent is the index to the quality of the act; and if the intent could always be correctly arrived at, of course such circumstances would be left out of consideration. And even as it is, it is difficult to see why certain contingencies, entirely out of the control of the accused, should affect his position in the most vital manner. For example, the same intent may result in murder, or wounding with intent to murder, according to the skilfulness of the surgeon who treats the wounded man. It is, however, obviously expedient, with our defective means of gauging the intent, to punish more seriously the completed crime, so that in cases where this consideration would have any effect the criminal may be induced to stop short or to resort to the less serious deed.

In offences against the person the degree of criminality is often determined by extraneous circumstances.

Again, it is the law that a person cannot be convicted of murder if the death does not ensue within a year and a day from the date of the blow or wound. It seems hard to explain why there should still be an arbitrary line thus drawn; and why it should not be

left to the jury to decide whether the death was the direct result of the wound. This seems to be another case of interference with the province of the jury. Again, it is plain that a surgeon's skill has very much to do with the recovery of the injured person (g).

(g) *v. R. v. Holland*, 2 M. & R. 351.

CHAPTER I.

HOMICIDE.

HOMICIDE—the destroying of the life of a human being Homicide.
 —includes acts varying from those which imply no
 guilt at all to those which constitute the greatest crime
 and meet with the extreme punishment of the law.
 Three kinds of homicide are usually distinguished,
 each class admitting of subdivision :—

Justifiable : Excusable : Felonious.

It may be stated at the outset that if the mere fact Presumed to be felonious.
 of the homicide is proved, the law presumes the malice
 which is necessary to make it felonious ; and, therefore,
 it lies on the accused to shew that it was justifiable or
 excusable.

Justifiable Homicide, that is, where no guilt, nor Justifiable homicide.
 even fault, attaches to the slayer.—For one species of
 homicide the term “justifiable” seems almost too weak,
 inasmuch as not only is the deed justifiable, but also
 obligatory. Three cases of justifiable homicide are
 recognized :—

i. Where the proper officer executes a criminal in Execution of a criminal.
 strict conformity with his legal sentence. A person
 other than the proper officer (*i.e.*, the sheriff or his
 deputy) who performs the part of an executioner is
 guilty of murder. The criminal must have been found
 guilty by a competent tribunal ; so that it would be
 murder otherwise to kill the greatest of malefactors.
 The sentence must have been legally given ; that is,
 by a court or judge who has authority to deal with

the crime. If judgment of death is given by a judge who has not authority, and the accused is executed, the judge is guilty of murder. The sentence must be strictly carried out by the officer (*i.e.*, the sentence as it stands after the remission of any part which the sovereign thinks fit), so that if he beheads a criminal whose sentence is hanging or *vice versa*, he is guilty of murder. Though the sovereign may remit a part of the sentence, he may not change it.

The two following instances of justifiable homicide are permitted by the law as necessary; and the first, at least, as for the advancement of public justice.

Homicide by one resisted in the execution of his duty.

ii. Where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. Homicide is justifiable on this ground in the following cases (*r*): (a) When a peace officer or his assistant, in the due execution of his office, whether in a civil or criminal case, kills one who is resisting his arrest or attempt to arrest. (b) When the prisoners in gaol, or going to gaol, assault the gaoler or officer, and he, in his defence, to prevent an escape, kills any of them. (c) When an officer, or private person, having legal authority to arrest, attempts to do so, and the other flies, and is killed in the pursuit. But here the ground of the arrest must be either a felony, or the infliction of a dangerous wound. (d) When an officer, in endeavouring to disperse the mob in a riot or rebellious assembly, kills one or more of them, he not being able otherwise to suppress the riot. In this case the homicide is justifiable both at common law and by the Riot Act (*s*).

In all these cases, however, it must be shewn that the killing was apparently a necessity.

(*r*) v. 4 Bl 179.

(*s*) 1 Geo. 1, st. 2, c. 5.

But it is not difficult to instance cases in which the officer would be guilty, (a) of *murder*, for example, if the killing in pursuit as above were in case of one charged with a misdemeanor only, or of one required merely in a civil suit (t); (b) of *manslaughter*, for example, if the killing in case of one so charged with a misdemeanor were occasioned by means not likely to kill, as by tripping up the fugitive's heels.

iii. When the homicide is committed in *prevention* of a forcible and atrocious crime. Such crimes, it is said, are the following:— Attempting to rob or murder another in or near the highway, or in a dwelling-house; or attempting burglariously to break a dwelling-house in the night-time. In such cases, not only the owner, his servants and members of his family, but also any strangers present, are justified in killing the assailant. But this justification does not apply to felonies without force, *e.g.*, pocket-picking; nor to misdemeanors of any kind.

Homicide in the prevention of crime.

A woman is justified in killing one who attempts to ravish her; and so, too, the husband or father may kill a man who attempts a rape on his wife or daughter, if she do not consent. And even if the adultery is by the consent of the wife, the husband taking the offender in the act and killing him, is guilty of manslaughter only.

It is said that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence, but he may even pursue the assailant until he finds himself or his property out of danger (u). But this will not justify a person firing upon every one who forcibly enters his house, even at night. He ought not to proceed to the last extremity until he has taken

(t) *v. R. v. Dadson*, 20 L. J. (M.C.) 57.

(u) *Fost.* 273; 1 *Hawk. c.* 28, ss. 21, 24.

all other possible steps. In fact, the conduct of the other must be such as to render it necessary on the part of the one killing to do the act in self-defence (*v*). This brings us very near to the line which separates justifiable from excusable homicide; in fact, it is difficult to distinguish between this and excusable homicide *se defendendo*. It may be questioned whether the distinction between justifiable and excusable is a substantial one; whether the cases under the former are not extreme cases of *se defendendo*.

Excusable
homicide.

Excusable Homicide.—We have just intimated that there is little if any ground for the distinction between justifiable and excusable homicide. Perhaps there may be something in this, that in the former case the killer is engaged in an act which the law enjoins or allows *positively*, while in the latter he is about something which the law *negatively* does not prohibit (*w*). In neither case is there the malice which is an essential of a crime. In former times, a very substantial difference was made between the two kinds of homicide. That styled “excusable” did not imply that the party was altogether excused; so much so that Coke says (*x*) that the penalty was death. But the earliest information which the records supply shews that the defendant was entitled to a complete pardon, and the restitution of his goods; but he had to pay a sum of money to procure this award. Now it is expressly declared by statute (*y*) that no forfeiture or punishment shall be incurred by any person who kills another by misfortune or in self-defence, or in any other manner without felony.

(*v*) *R. v. Bull*, 9 C. & P. 22.

(*w*) The reason usually given is that in both the forms of excusable homicide there may be some degree of blame attributable. In the first case, i.e., self-defence, inasmuch as in quarrels usually both parties are to some extent in fault; in the second, i.e., accident, the party may not have used sufficient caution. But to visit the act under all circumstances with the punishments due to what *may* have happened is obviously unjust.

(*x*) 2 Inst. 148, 315.

(*y*) 24 & 25 Vict. c. 100, s. 7, re-enacting 9 Geo. 4, c. 31, s. 10.

The two kinds of so-called excusable homicide are homicide in self-defence ; homicide by accident or misfortune.

i. *Se defendendo*, upon sudden affray.—We have noticed above the case of a man killing another when the latter is engaged in the performance of some forcible crime. What we have now to deal with is a kind of self-defence, the occasion of which is more uncertain in its origin, and in which it seems natural to impute some moral blame to both parties. It happens when a man kills another, upon a sudden affray, in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling. This is one species of what is called *chance* (casual) or *chard* (in heat) *medley* (z). Homicide *se defendendo*.

To bring the killing within this excuse, the accused must shew that he endeavoured to avoid any further struggle, and retreated as far as he could, until no possible, or at least probable, means of escaping remained ; that then, and not until then, he killed the other in order to escape destruction. It matters not that the defendant gave the first blow, if he has terminated his connection with the affray by declining further struggle before the mortal wound is given. Of course the defence must be made by the person assaulted, while the danger is imminent ; for if the struggle is over, or the other is running away, this is revenge and not self-defence. Nor will a retreat of the nature indicated avail if the blow is the result of a concerted design ; as in the case of a duel, where the two parties have agreed to meet each other, and one, having retreated as far as he can, kills the other in protection of himself. Nor will it avail if there has been a blow What is self-defence.

(z) The term is sometimes applied to the killing of a person by one engaged in the commission of an unlawful act, without any deliberate intention of doing any mischief ; also to any manner of homicide by misadventure.

from malice *prepenſe*, and the ſtriker has retreated and then killed the other in his own defence.

As the definition ſhews, the killing in defence of thoſe ſtanding in the relation of huſband and wife, parent and child, maſter and ſervant, is excuſed; the act of ſuch perſon who interferes being conſtrued as the act of the party himſelf.

Distinction
between
homicide *se*
defendendo and
manslaughter.

The diſtinction between this kind of homicide and the crime known as manſlaughter is ſometimes very ſubtle. It may be ſtated in this form: that in the former the ſlayer could not otherwiſe eſcape, if he would; in manſlaughter, he would not eſcape, if he could. In other words, in the former caſe the accuſed has done all that he can to avoid the ſtruggle or its continuation; in the latter the killing is done in the actual combat (*a*).

Homicide *per*
infortunium.

ii. *Per infortunium*, by miſadventure.—When a perſon doing a lawful act, without any intention of hurt, by accident kills another: as, for example, a man is at work with a hatchet, the head flies off by accident, and kills a byſtander.

The act muſt
be lawful,

To bring the ſlaying within the protection of the excuſe, the act about which the ſlayer is engaged muſt be (*a*) a lawful one. For if the ſlaying happen in the performance of an illegal act it is manſlaughter at leaſt; and murder, if ſuch act is a felony (*b*). It muſt alſo (*b*) be done in a proper manner. Thus it is a lawful act for a parent to chaſtiſe his child, and therefore if the parent happen to occaſion the death of the

done in a
proper
manner,

(*a*) The books notice one ſpecies of homicide *se defendendo*, in which it is ſaid that the party ſlain and the party ſlaying are equally innocent, though the act is deliberately done, and there is no actual combat. The inſtance uſually given is that of two ſhipwrecked perſons clinging to a plank which is capable of holding one only. One thruſts the other off, cauſing him to be drowned. This is juſtifiable, or, at leaſt, excuſable homicide.

(*b*) *v. R. v. Hodgson*, 1 Leach, 6.

other, if the punishment is moderate, the parent will be innocent as *per infortunium*. But if the correction exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of the punishment, and death ensues, it is manslaughter at the least, and in some cases murder. Thus it will, as a rule, be murder if the instrument used is one likely to cause death; manslaughter, if the instrument is not of such a character, though an improper one.

The act must also (c) be done with due caution to prevent danger; and therefore with more caution by those using dangerous instruments or articles. Due caution is such as to make it improbable that any danger or injury should arise from the act to others. Thus throwing stones from a house, whereby the death of some one is caused, may be murder, manslaughter, or homicide by misadventure: murder, if the thrower knew that people were passing, and gave no notice; manslaughter, if a time when it was not likely that any people were passing; excusable homicide if in a retired place where persons were not in the habit of passing or likely to pass (c). It has been said that to be criminal, the negligence must be so gross as to be reckless (d), but it is impossible to define culpable or criminal negligence.

Felonious homicide, or homicide coupled with a felonious intention, is capable only of a negative description—the killing of a human creature of any age or sex without justification or excuse. The human creature killed may be either one's self or another.

SUICIDE OR SELF-MURDER.

Suicide is the felony of murder, inasmuch as it is the murder of one of the sovereign's subjects. To be such

(c) Fost. 262.

(d) *R. v. Noakes*, 4 F. & F. 921, n.

offence, the act must be committed deliberately, and by one who has arrived at years of discretion, and is in his right mind. The supposed absence of the last requisite is often taken advantage of by a jury guilty of "an amiable perjury," in order to save the reputation of the deceased. In fact, sometimes their verdicts shew they deem the very act of suicide evidence of insanity.

Not only is he guilty of suicide who, in pursuance of a fixed intention, takes away his life, but also he who, maliciously attempting to kill another, occasions his own death; as where a man shoots at another, and, the gun bursting, he kills himself. But if a man is killed at his own request by the hand of another, the former is not deemed in law a *felo de se*, though the latter is a murderer.

If one persuades another to kill himself, and he does so, the adviser is guilty of murder. So, also, if two persons agree to commit suicide together, if one escapes and the other dies, the survivor is guilty of murder (e), though it is extremely doubtful whether he would be executed.

Punishment.

At one time the punishment for this crime was an ignominious burial in the highway, without Christian rites, with a stake driven through the body; and the vicarious punishment of his friends by the forfeiture of all his goods and chattels to the Crown. But some time back the law was altered, the only consequence being the denial of Christian burial, the *felo de se* being buried in the churchyard or other burying-ground, within twenty-four hours after the inquest, between the hours of nine and twelve at night (f). And now not only is the ignominious burial in the highway prohibited, but the interment of such a person may be

(e) *R. v. Dyson*, R. & R. 523.

(f) 4 Geo. 4, c. 52, s. 1.

made in any manner authorized by the Burial Laws Amendment Act, 1880 (*g*). The forfeiture has been done away with in this as well as in other kinds of felony (*h*).

An attempt to commit suicide is not an attempt to commit murder within the Offences against the Person Act (*i*), but still remains a common law misdemeanor. Attempted suicide.

The felonious killing of *another* is either murder or manslaughter. In dealing with the crime of murder, we shall anticipate, to some extent, the law of manslaughter, a great part of the law on the subject consisting in a distinction of the two crimes. Felonious killing of another.

MURDER.

Murder is popularly regarded as the gravest crime known to the law. As a rule it would occupy the same position, regarded both from a moral and from a legal point of view. But that this is not always the case an example will serve to shew. Both of the following acts are murder, and punishable by death. A man, having received a slight insult from another, dogs his path for six months, and, with all circumstances of aggravation, kills him in cold blood. A man carrying a gun sees a hen and resolves to shoot and then appropriate it; he shoots, and by accident wounds a person who has come upon the scene; the wounded man dies nine months afterwards, though his life might have Murder, varies in its moral character.

(*g*) 45 & 46 Vict. c. 19, ss. 2 and 3.

(*h*) 33 & 34 Vict. c. 23. "Suicide may be wicked, and is certainly injurious to society, but it is so in a much less degree than murder. The injury to the person killed can neither be estimated nor taken into account. The injury to survivors is generally small. It is a crime which produces no alarm, and which cannot be repeated. It would, therefore, be better to cease altogether to regard it as a crime, and to provide that any one who attempted to kill himself, or who assisted any other person to do so, should be liable to secondary punishment."—Fitz. St. 121.

(*i*) 24 & 25 Vict. c. 100, s. 15.

been saved if he had submitted to an operation, or if the physician had been more skilful. But, on the other hand, there is one mode of depriving of life which is at least equally culpable, viewing the matter morally, but which is not regarded as murder, namely, taking away a man's life by perjury (*j*).

Definition of murder.

We may adopt Coke's definition of murder for the purpose of explaining the crime. "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace with malice aforethought, either express or implied" (*k*).

The sanity, &c., of the offender.

(*a*) *The offender must be of sound memory and discretion.*—Thus are excluded all idiots, lunatics, and infants, in accordance with the rules as to capability of committing crimes which have already been set forth (*l*). To which we may add, that a person would be guilty of manslaughter at the most if he were not conscious that the act done was one which would be likely to cause death (*m*). Of course the person procuring an idiot to commit murder, or, indeed, any crime, is guilty himself of the crime.

The unlawful killing.

(*b*) *Unlawfully killeth*, that is, kills without justification or excuse.—As we have seen, the presumption is against the accused, and it is for him to purge the act of its felonious character by proving such justification or excuse.

The form of death.

It is perfectly immaterial what may be the particular form of death, whether poisoning, striking, starving, drowning, or any other (*n*). Any act, the probable

(*j*) *R. v. Macdaniel*, Fost. 131.

(*k*) 3 Inst. 47.

(*l*) v. p. 19.

(*m*) *R. v. Vamplex*, 3 F. & F. 520.

(*n*) As to swearing away a man's life, v. p. 86, n.

consequence of which may be, and eventually is, death, is murder, though no stroke be struck, and, what is more noticeable, though the killing be not primarily intended; for example, when a mother hid her child in a pig-stye, where it was devoured (o). So if one, under a well-grounded apprehension of personal violence, does an act which causes his death, as for instance, jumps out of a window, he who threatens is answerable for the consequences (p). A person may also be guilty through mere nonfeasance; as if it was his duty and in his power to supply food to a child unable to provide for itself, and the child died because no food was supplied (q).

It is no defence to shew that the deceased was in ill-health and likely to die when the wound was given (r). Nor is it a defence that the immediate cause of death was neglect on the part of the doctor, or the refusal of the party to submit to an operation; though it would be otherwise if the death were caused by improper applications to the wound, and not the wound itself (s). To make the killing murder the death must follow within a year and a day after the stroke or other cause; for if the death is deferred for that length of time, the law will presume that it arose from some other cause.

If a person is indicted for one species of killing, *e.g.*, poisoning, he cannot be convicted by evidence of a totally different species of death, *e.g.*, starving. But if the difference consists only in a detail, *e.g.*, whether the instrument was a sword or an axe, this is immaterial.

(o) 1 Hale, P. C. 433.

(p) *R. v. Evans*, 1 Russ. 426.

(q) *R. v. Friend*, R. & R. 20.

(r) *R. v. Martin*, 5 C. & P. 130.

(s) *R. v. Holland*, 2 M. & R. 351.

Finding of the body. As a general rule, proof is required of the finding of the body of the deceased. But this rule is not inflexible, as where the direct evidence brought before the jury is sufficiently strong to satisfy them that a murder has really been committed.

The person killed. (c.) *Any reasonable creature in being and under the king's peace.*—Therefore killing a child in its mother's womb is no murder (t), but it is otherwise if the child is born alive, and dies from wounds or drugs received in the womb. "Under the king's peace" excludes only alien enemies who are actually engaged in the exercise of war (u).

Murder-malice. (d.) *With malice aforethought.*—The term "malice" is a most difficult one. It is used in various and conflicting senses, and the mind is apt to slide from the one to the other. The simple etymological signification of "wickedness" may generally be disregarded. In another sense, as we have seen (v), malice, taken as equal to criminal intention, is of the essence of every crime. Therefore this view of the word will not serve to distinguish one crime from another. The murder-malice is usually described as "aforethought" or "*prepenſe*," but this addition, in itself, will not help us to any better understanding of the state of mind required to constitute murder (w).

That this malice aforethought is not what its name seems to imply—malevolence or ill will towards the deceased—is manifest, when we consider that perhaps

(t) But v. p. 182.

(u) 1 Hale, P. C. 433.

(v) v. p. 13.

(w) "The word 'aforethought' is unfortunate; 'wilful and malicious' homicide would be better. The word 'aforethought' countenances the popular error that a deliberate premeditated intent to kill is required in order to constitute the guilt of murder, whereas it is only one out of several states of mind which have that effect. It is, moreover, an unmeaning word, for the thought, the state of mind, whatever it is, must precede the act; and it precedes it equally, whether the interval is a second, or twenty years."—Fitz. St. 118.

the majority of murders are committed with a view to robbery; or, again, when we remember that murder can be committed though the murderer has not the slightest wish to injure, or has not the slightest knowledge of the deceased, as in the case mentioned above of shooting at the fowl; nay more, we can conceive of the case of a person being convicted of the murder of his dearest friend or relative. What, then, is this superior degree of malice? It may be said to be a felonious design or intention in general. This intention may be sometimes regarded as unfixed or floating (as in the fowl case). The deed causing death is done, and at the same time to it is attached this moveable quality. It must be noticed that this murder-malice is not a motive. The motive is to get the gold, hatred, &c. It is a difficult matter to give a description of malice which will apply to all cases of murder, of so various character are they, and so built up on individual decisions.

At the risk of confusing our idea of this essential of murder, we must mention the ordinary distinction between *express* and *implied* malice. But here it will be no easy matter to suppress the tendency to revert to the moral view of malice, which is always lurking about ready to make its appearance. Malice, express or implied.

The true ground of distinction, if it is necessary to make one, seems to have been apprehended in the Indian penal code (x).

Express malice may be said to be the *positive possession* of an intention:— Express malice.

- i. Of causing death.
- ii. Of causing such bodily injury as the offender

(x) Article 300.

knows is likely to cause death, *e.g.*, beating with an iron bar.

iii. Of causing bodily injury, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death (*y*).

Implied
malice.

Implied malice may be said to be the possession of a general intention of such a nature *implied* from the acts of the offender, or the wanton running of a risk by a person committing an act, who knows that it will probably cause death, or bodily injury which may cause death, without any excuse for incurring such risk (*z*).

Punishment.

As to the punishment of murder, nothing further need be said here than that the sentence is death (*a*); with regard to which, and its execution, particulars will be given in a later chapter. Accessories after the fact to murder are liable to penal servitude to the extent of life (*b*).

On an indictment for murder, the jury may convict the prisoner of manslaughter, or, of course, of an attempt to murder; but not of an assault (*c*). And so a person charged as accessory after the fact to murder, may be convicted as accessory to manslaughter, if the principal felon be convicted of manslaughter only (*d*).

(*y*) Express malice is generally described as that "When one with a sedate and deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm" (1 Hale, P. C. 451). But this does not at all square with the legal idea of malice.

(*z*) The example usually given of implied malice, namely, that of a man wilfully poisoning another, seems, indeed, to be a case of express malice, as there most certainly is an evil intention present. The truth is, that in this example also there is a recurrence to the motive view of malice; in fact, the authority (1 Hale, P. C. 455) proceeds, "In such a deliberate act the law presumes malice, though no particular enmity can be proved."

(*a*) 24 & 25 Vict. c. 100, s. 1.

(*b*) Ibid. s. 67.

(*c*) As to conspiracy to murder, v. p. 131.

(*d*) *R. v. Richards*, L. R. 2 Q. B. 311; 46 L. J. (M.C.) 200.

MANSLAUGHTER.

The unlawful killing of another without malice, *Manslaughter*, either express or implied. The malice referred to here is the murder-malice, at the meaning of which we have been endeavouring to arrive.

In this crime, again, we shall find acts varying to the utmost in their moral gravity and offensiveness. Perhaps on no other charge do persons more often appear in the dock and leave it without a stain on their characters. To take one class of examples—it constantly happens after an accident in a mine or on a railway that some of those engaged in the management of the one or the other are required to meet a charge of manslaughter which is preferred against them.

Moral character of the crime varies.

Two kinds of manslaughter are distinguished:—

- i. Upon a sudden heat (termed *voluntary*).
- ii. In the commission of an unlawful act (termed *involuntary*) (e).

i. *Voluntary* (so-called).—The distinguishing mark of this sort of manslaughter is the provocation giving rise to sudden anger, during which the deed causing death is done. If upon a sudden quarrel two persons fight and one of them kills the other, the former will be guilty of manslaughter only, unless there are special circumstances which indicate evil design. But the act will be viewed in the less serious light of manslaughter only as long as the outburst of passion continues; not that the struggle need take place on the spot, for if

Voluntary manslaughter.

(e) The objectionableness of the terms "voluntary" and "involuntary," as opposed to each other, to denote varieties of the same crime, is obvious. There is no such thing as an involuntary crime. If the action be not a voluntary one it is not criminal (v. p. 12). What seems to be meant is that in the one case death is anticipated, in the other it is not.

the two at once adjourn to another place to fight, it will still be only manslaughter. So, also, in other cases of grave provocation, as if one man pulls another's nose, or is taken in adultery with another's wife. But here again, on the same grounds, to reduce the homicide to manslaughter, the cause of death must be inflicted at once, while the provocation is still exercising its full influence. Otherwise the slaying will be regarded as a deliberate act of revenge (*f*). It is needless to add that the plea of provocation will not avail if the provocation was sought for and induced by the slayer.

The instrument used is a material point.

The instrument used when the person is acting under provocation is also a material consideration. It may be said that the provocation must be of the gravest nature to render guilty of manslaughter only one who uses a deadly weapon, or otherwise shews an intention to do the deceased grievous bodily harm. But a slighter provocation will suffice if the instrument used is one not likely to cause death, as a stick, or a blow with the fist. In fact, the mode of resentment must bear a reasonable proportion to the provocation to reduce the offence to manslaughter (*g*).

Manslaughter distinguished from homicide in self-defence.

Manslaughter is to be distinguished from homicide in self-defence on sudden affray. In the latter, the ground for the blow, &c., is the necessity to take such a step for self-preservation; in the former, this necessity does not exist, but its place is taken by a sudden accession of ill-will.

Involuntary manslaughter.

ii. *Involuntary* (so-called) when the death, not being intended, is caused in the commission of an unlawful act. By this is meant that the unlawfulness of the act in which the accused is engaged is the ground

(*f*) *R. v. Hayward*, 6 C. & P. 157.

(*g*) *R. v. Steadman*, *Fost.* 292.

of the homicide being regarded as manslaughter, and not homicide by misadventure merely. In the cases mentioned above under voluntary manslaughter, the death is caused by an unlawful act, but there that is not the distinguishing mark of the manslaughter. By "unlawful" here must be understood what is *malum in se*, and not what is merely *malum quia prohibitum*. Thus, then, if a man shooting at game by accident kills another, it is homicide by misadventure only, even although the party is not qualified (*h*).

Here, again, we may observe that it is immaterial ^{The unlawful act.} whether the unlawfulness is in the act itself or (that which comes to the same thing) in the mode in which it is carried out. It must also be borne in mind that if the unlawful act is a felony, the homicide amounts to murder. An instance of manslaughter in the commission of an unlawful act is furnished when one person kills another while the two are playing at an unlawful game; of manslaughter in doing a lawful act in an unlawful manner,—when a workman throws down stones into a street where persons may but are not likely to be passing.

One form of doing an act in an unlawful manner is ^{Manslaughter through negligence.} *negligence*. This consideration very frequently presents itself in manslaughter. It may be said generally that whatever constitutes murder when done by fixed design, constitutes manslaughter when it arises from culpable negligence; for example, when a near-sighted man drives at a rapid rate, sitting at the bottom of his cart, and thereby causes the death of a foot-passenger (*i*). Again, when a person without taking proper precautions does an act which is dangerous, though not unlawful in itself, as, for instance, shooting at a target from a distance of 100 yards with a rifle sighted at 950 yards, in the course of which he kills another person,

(*h*) *Fost.* 259.

(*i*) *v. R. v. Walker*, 1 C. & P. 320.

although at a spot distant 393 yards from the firing point, he does a criminal act which in the law amounts to manslaughter (*j*). A large class of cases is that in which the death ensues from the treatment of disease. The man, whether a medical practitioner or not, is not indictable unless his conduct is marked by gross ignorance or gross inattention (*k*). Mere neglect on the part of a parent to provide medical aid for his child of tender years, in consequence of which his child dies, is not manslaughter, unless it is proved affirmatively that the death was caused or accelerated by such neglect; and medical evidence on behalf of the prosecution that the child's life probably might have been prolonged or saved by the parent calling in medical aid is not sufficient evidence to support a conviction (*l*). With regard to negligence, there is a great difference between criminal and civil proceedings. The criminal law does not recognize the defence of contributory negligence in manslaughter (*m*).

Accessories
before the
fact.

It is commonly said that in manslaughter there can be no accessories before the fact, because the act causing death is done without premeditation. But though this may be true in cases the gist of which is the sudden heat, it is easy to imagine cases in which this principle could not be maintained (*n*).

Punishment.

Manslaughter is a felony, punishable by penal servitude to the extent of life—or in lieu of, or in addition to, the penal servitude or imprisonment, a fine may be imposed (*o*). Cases of mere carelessness, &c., legally

(*j*) *R. v. Salmon*, 6 Q. B. D. 79; 50 L. J. (M.C.) 25; 43 L. T. N. S. 573.

(*k*) *R. v. Long*, 4 C. & P. 398.

(*l*) *R. v. Morby*, 8 Q. B. D. 571; 51 L. J. (M.C.) 85; 46 L. T. N. S. 288; 30 W. R. 613.

(*m*) *R. v. Swindall*, 2 C. & K. 230; *R. v. Jones*, 11 Cox, 544. For other classes of acts which amount to manslaughter, the reader is referred to the classification of intents given below.

(*n*) *v. R. v. Gaylor*, cited above, p. 36.

(*o*) 24 & 25 Vict. c. 100, s. 5.

amounting to manslaughter, are often more appropriately punished by pecuniary fine than by the indignity of imprisonment.

Having inquired into the nature of the crimes of murder and manslaughter, we are now in a position to examine certain classes of acts, and determine by the circumstances whether they fall under the head of murder, manslaughter, or excusable homicide.

Killing by *Fighting* :—

Fighting.

i. Murder—Deliberately fighting a duel—or after time for cooling—or under any other circumstances indicating deliberate ill-will.

ii. Manslaughter—In a sudden quarrel where the parties immediately fight—or where the parties are fighting in an unlawful amusement.

iii. Excusable—In a sparring match with gloves, or other lawful amusement, fairly conducted in a private room.

Killing by *Correction* :—

Correction.

i. Murder—With weapon likely to cause death, *e.g.*, an iron bar.

ii. Manslaughter—With an instrument not likely to kill, though improper for use in correction—or where the quantity of punishment exceeds the bounds of moderation.

iii. Excusable—Correcting in moderation a child, servant, scholar, or criminal intrusted to one's charge.

Killing *without intending to kill whilst doing another act* :—

In doing an unlawful act.

i. Murder—If that other act is a felony.

ii. Manslaughter—If that other act is unlawful, *i.e.*, *malum in se*.

iii. Excusable—If that other act is lawful, *i.e.*, not *malum in se*.

[But see next paragraph.]

In doing a dangerous act.

Killing *whilst doing a lawful but dangerous act, e.g.*, driving :—

i. Murder—If he perceives the probability of the mischief, and yet proceeds with his act.

ii. Manslaughter—If he might have seen the danger if, as he ought to have done, he had looked before him—or if, though he previously gave warning, this warning was not likely to prove entirely effectual, *e.g.*, driving in a crowded street.

iii. Excusable—If he uses such a degree of caution as to make it improbable that any danger or injury will arise to others.

Homicide of officers, &c.

Killing *officers or others engaged in effecting the ends of justice* :—

i. Murder—If the officer or other person is acting with due legal authority, and executing such authority in a legal manner, the defendant knowing that authority—or, in the case of a private person interfering, the intention of such person being intimated expressly.

ii. Manslaughter—If any one of these requisites is absent (*p*).

By officers, &c.

Killing *by officers and others in the nominal execution of their duty* :—

(*p*) "The guilt of the offender may thus depend entirely upon nice and difficult questions belonging to the civil branch of the law, such as the technical regularity of civil process or the precise duty of a minister of justice in its execution."—Broom, C. L. 922.

i. Murder—If the killing happens in the pursuit of a person not resisting, but fleeing, such person being charged with a misdemeanor only, or the arrest being only in a civil suit.

ii. Manslaughter—As above, if the death is caused by means not likely or intended to kill—or if, in an apprehension for felony, there is no need for the violence used by the officer.

iii. Justifiable—If the officer or other is resisted in the legal execution of his duty, and this in civil as well as in criminal cases—if a felon or giver of a dangerous wound cannot be otherwise apprehended, though he does not resist but only flees (*q*).

ATTEMPT TO MURDER.

This crime is frequently described by the judges as, next to actual completed murder, the most serious crime known to the law. The Offences against the Person Act, 1861, deals in several sections with attempts to murder effected in various ways. The punishment in every case is the same, namely, penal servitude to the extent of life. Why the last and general section would not suffice if it stood alone, inasmuch as it comprehends all the others, and awards the same punishment, it is hard to conceive (*r*). The various attempts specified are the following:—

Administering poison, wounding, or causing grievous bodily harm, with intent to murder (*s*).

Attempting to poison, shoot, drown, suffocate, or strangle, with like intent, whether any bodily injury

(*q*) v. Appendix at end of chapter.

(*r*) "The subdivision of the enactments is highly characteristic of English law, and is not without interest as a memorandum of the successive steps by which the law was brought into the present shape."—Fitz. St. 48.

(*s*) 24 & 25 Vict. c. 100, s. 11.

be effected or not (*t*). Drawing from one's pocket a loaded pistol with intent to commit, but which pistol is snatched away before anything can be done, does not amount to attempt to murder (*u*).

Destroying or damaging any building by gunpowder or other explosive substance, with like intent (*v*).

Setting fire to any vessel or its belongings, or casting away or destroying any vessel, with like intent (*w*).

Attempting to murder in any other way (*x*).

APPENDIX.

Recapitulation
of distinctions
between
murder, man-
slaughter, and
non-felonious
homicide.

The importance of a clear apprehension of the state of the law as to what acts are murder, manslaughter, and non-felonious homicide respectively, makes it not impertinent to insert the following compilation of distinctions judicially laid down on the subject, made by Sir James Stephen (Gen. View of Crim. Law, 116):—

Murder.

“The following states of mind have been specifically determined to be wicked or malicious in the degree necessary to constitute murder:

“(a.) An attempt to kill, whether directed against the person killed or not, or against any specific person or not.

“(b.) An intent to commit felony.

“(c.) An intent illegally to do great bodily harm.

“(d.) Wanton indifference to life in the performance of an act likely to cause death, whether lawful or not.

(*t*) 24 & 25 Vict. c. 100, s. 14.

(*u*) *R. v. Brown*, 10 Q. B. D. 381; 52 L. J. (M.C.) 49; 48 L. T. N. S. 270; 31 W. R. 460.

(*v*) 24 & 25 Vict. c. 100, s. 12.

(*w*) *Ibid.* s. 13.

(*x*) *Ibid.* s. 15.

"(e.) A deliberate intent to fight with deadly weapons.

"(f.) An intent to resist a lawful apprehension by any person legally authorized to apprehend.

"The following states of mind have been determined **Manslaughter**. to constitute that lighter degree of malice which is necessary to the crime of manslaughter:—

"(a.) An intent to kill under the recent provocation, either of considerable personal violence inflicted on the prisoner by the deceased, or of the sight of the act of adultery committed by the deceased with the prisoner's wife.

"(b.) An intent to inflict bodily injury not likely to cause death under a slight provocation, as when a man striking a trespasser with a slight stick kills him.

"(c.) A deliberate intent to fight in a manner not likely to cause death, or an intent to use a deadly weapon in a fight begun without the intention to use it.

"(d.) An intent to resist an unlawful apprehension, or an apprehension of the lawfulness of which the prisoner had no notice.

"(e.) An intent to apprehend, or otherwise to execute legal process executed with unnecessary violence.

"(f.) Negligence in doing a lawful act, or an unlawful act not amounting to felony.

"The following states of mind have been held not to be malicious or wicked at all, and when any of them exist at the time when death is caused no crime is committed: **Non-felonious homicide.**

"(a.) An intent to execute sentence of death.

"(b.) An intent to defend person, habitation, or pro-

perty against one who manifestly intends, or endeavours by violence or surprise, to commit a known (*i.e.*, apparent) felony, such as rape, robbery, arson, burglary, &c.

“(c.) An intent lawfully to apprehend or keep in custody a felon who cannot otherwise be apprehended or kept in custody, or to keep the peace if it cannot otherwise be kept.

“(d.) Absence of all unlawful or malicious intents or states of mind. (This is the case of accident).”

CHAPTER II.

RAPE, ETC.

RAPE.

THE offence of having carnal knowledge of a woman by force against her will. Definition of rape.

Certain persons cannot be convicted of this crime. Persons who cannot be convicted of the crime.
 An infant under the age of fourteen is deemed in law to be incapable of committing this offence, on account of his presumed physical incapacity. And this is a presumption which cannot be rebutted by evidence of capacity in the particular case. Neither can a husband be guilty of a rape upon his wife. But both a husband and a boy under fourteen may be convicted as principals in the second degree, and may be punished for being present aiding and abetting.

To constitute the offence, the act must be committed by force, and without the consent of the female. If, however, she yielded through fear of death or duress, it is nevertheless rape; for here the consent is at most imperfect. So also when she submitted under a false representation, such as that she was about to undergo medical treatment, she being ignorant of the nature of the act (y). But the crime is not committed when the woman has consented to the act of connection under the belief that the man was her husband. In that case, however, the man may be convicted of an assault (z). It is equally rape though the female is a common pros-

(y) *R. v. Flattery*, L. R. 2 Q. B. 410; 46 L. J. (M.C.) 130.

(z) *R. v. Barrow*, L. R. 1 C. C. R. 156; 38 L. J. (M.C.) 20. It is doubtful whether, after the remarks of the Judges in *R. v. Flattery*, *R. v. Barrow* would now be followed.

titute or the concubine of the prisoner; but circumstances of this nature will probably operate with the jury in their consideration as to whether there was consent. It is necessary to prove penetration, but not anything further (a). If the prosecution fail to prove this, the prisoner may nevertheless be convicted of the attempt.

Credibility of
the testimony
of the woman.

At almost every trial for this crime the words of Sir Matthew Hale are recalled: "It is an accusation easy to be made and hard to be proved, but harder to be defended by the party accused, though innocent." It will be well to estimate the degree of credibility of the testimony of the woman, for of course she is a competent witness. On this point we cannot do better than remember the words of Blackstone (b). The credibility of her testimony, and how far she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. The prisoner may call evidence to her generally bad character for want of chastity or indecency, and of her having had connection with him previously, but not of her having had connection with others. As to the last point she may be asked the question, but is

(a) 24 & 25 Vict. c. 100, s. 63.

(b) 4 BL 213.

not compelled to answer it; if she denies it, the person referred to cannot be called to contradict her (c).

The punishment for this crime, which is a felony, is penal servitude to the extent of life (d).

CARNALLY ABUSING CHILDREN.

To unlawfully and carnally know and abuse any girl, ^{Carnally abusing children.} if she is under the age of twelve years, is a felony, punishable by penal servitude to the extent of life; if between twelve and thirteen, whether with or without the consent of the girl, it is a misdemeanor, punishable by imprisonment not exceeding two years (e).

In this offence it is immaterial whether the act were done with or without the consent of the child. She may be a witness on her oath if she appears sufficiently to understand the nature and obligation of an oath.

Another offence may be noticed here:—By false pre- ^{Procuring young females to have connection, &c.} tences, false representations, or other fraudulent means, to procure any female under the age of twenty-one years to have illicit carnal connection with any man is a misdemeanor, punishable by imprisonment not exceeding two years (f).

To commit an indecent assault upon any female, or ^{Indecent assault, &c.} to attempt to have carnal knowledge of a girl under twelve years of age, is a misdemeanor, punishable by imprisonment not exceeding two years (g).

It is no defence to a charge or indictment for an

(c) *R. v. Holmes*, L. R. 1 C. C. R. 334; 41 L. J. (M.C.) 12.

(d) 24 & 25 Vict. c. 100, s. 48.

(e) 38 & 39 Vict. c. 94, ss. 3 and 4; but the latter section does not prevent a conviction for felony under the statute 24 & 25 Vict. c. 100, s. 48. *R. v. Ratcliffe*, 10 Q. B. D. 74; 52 L. J. (M.C.) 47; 40 L. T. N. S. 388.

(f) 24 & 25 Vict. c. 100, s. 49.

(g) *Ibid.* s. 52.

indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency (*h*).

UNNATURAL CRIMES.

Sodomy and
bestiality.

To commit the crime against nature, with mankind or with any animal, is a felony, punishable by penal servitude; the penal servitude may extend to life, but may not be less than ten years (*i*). The evidence is the same as in rape, with two exceptions: (a) It is not necessary to prove the offence to have been committed without the consent of the person upon whom it was perpetrated. (b) Both parties, if consenting, are equally guilty; but if one of the parties is a boy under the age of fourteen years, it is felony in the other only.

Attempt, &c.

To attempt to commit the said crime, or to make an assault with intent to commit the same, or to make any indecent assault upon a male person, is a misdemeanor, punishable by penal servitude to the extent of ten years (*j*).

ATTEMPTS TO PROCURE ABORTION.

Attempt to
procure
abortion,

Three classes of persons may be guilty of crimes under this heading. The woman herself—the person who procures or supplies the drug, &c.—some other person.

by the woman,

For a woman being with child, with intent to procure her own miscarriage, to administer to herself any poison or other noxious drug or thing, or to use any instrument or other means; or

(*h*) 43 & 44 Vict. c. 45, s. 2.

(*i*) 24 & 25 Vict. c. 100, s. 61.

(*j*) Ibid. s. 62. As to obtaining money by threatening to accuse of this crime, v. p. 111.

For any person to do the same with intent to procure the miscarriage of any woman, whether she be with child or not, is a felony, punishable by penal servitude to the extent of life (*k*). It is not necessary that the drug administered should have any tendency to produce miscarriage; it is enough if it is "noxious" and is given with the intent charged, if it is in itself hurtful (*l*). by some other person.

For any person to procure or supply poison or other noxious thing, or any instrument or other thing, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of a woman, is a misdemeanor, punishable by penal servitude to the extent of five years (*m*). Supplying the means.

CONCEALMENT OF BIRTH.

If a woman is delivered of a child, every person who by any secret disposition of the dead body of the child, whether it died before, at, or after its birth, endeavours to conceal the birth thereof, is guilty of a misdemeanor, punishable by imprisonment not exceeding two years. A person tried for and acquitted of murder may be sentenced for concealment of birth, if the facts justify that conclusion (*n*). Concealment of birth.

The denial of the birth only is not sufficient. There must be some act of disposal of the body after the child is dead (*o*). In order to convict a woman of attempting to conceal the birth of her child, a dead body must be found and identified as that of the child of which she is alleged to have been delivered (*p*). It will be noticed What must be proved.

(*k*) 24 & 25 Vict. c. 100, s. 58.

(*l*) *R. v. Cramp*, 14 Cox, 390.

(*m*) 24 & 25 Vict. c. 100, s. 59.

(*n*) *Ibid.* s. 60.

(*o*) *R. v. Turner*, 8 C. & P. 755.

(*p*) *R. v. Williams*, 11 Cox, 684.

that the offence may be committed by others, and not only by the mother.

ABDUCTION.

Abduction. We may distinguish three classes of cases:—

i. Of a woman on account of her *fortune*.

On account of
the woman's
fortune.

Where a woman of any age has any interest (legal or equitable, present or future, absolute, conditional, or contingent) in any real or personal estate, or is a presumptive heiress or co-heiress, or presumptive next of kin to any one having such interest—(a) whosoever, from motives of *lucre*, takes away or detains such woman against her will, with intent himself, or to cause some other person, to marry her, or have carnal knowledge of her—or (b) whosoever fraudulently allures, takes away, or detains such woman, being under the age of *twenty-one*, out of the possession or against the will of her father or mother, or other person having the lawful care or charge of her, with like intent, is guilty of a felony, punishable by penal servitude to the extent of fourteen years. The convicted person is also rendered incapable of taking any interest in her property; and if he is married to her, the property will be settled as the Chancery Division, upon an information at the suit of the Attorney-General, appoints (g). The intent to marry or have carnal knowledge need only be proved, not the carrying out of that intent. The wife is a competent witness either for or against the prisoner.

ii. By *force*, with *intent to marry*.

By force, with
intent to
marry.

The same punishment attends the forcible taking away or detaining against her will a woman of any age, with intent to marry or carnally know her, or cause

(g) 24 & 25 Vict. c. 100, s. 53.

her to be married or carnally known by any other person (*r*).

iii. Of a girl under *sixteen* years of age.

To unlawfully take or cause to be taken any unmarried girl under the age of sixteen out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, is a misdemeanor, punishable by imprisonment not exceeding two years (*s*). Of girl under sixteen.

If the girl leaves her father, &c., without any inducement on the part of the defendant, and then goes to him, he is not within the statute (*t*). Nor is he, if he did not know, and had no reason to know, that she was under the lawful charge of the father or other person (*u*). Of course mere absence for a temporary purpose and with intention of returning does not interrupt the possession of the father, &c. It is no defence that the defendant did not know her to be under sixteen, or might suppose from her appearance that she was older, or even that he believed that he knew she was over that age (*v*). A taking by force is not necessary to constitute the offence. It is immaterial whether there be any corrupt motive, whether the girl consent, and whether the defendant be a male or female (*w*). Who are within this provision.

CHILD-STEALING, ABANDONING, ETC.

To unlawfully, either by force or fraud, lead or take away, or decoy or entice away, or detain a child under the age of fourteen years, with intent to deprive the parent, or other person having lawful care or charge, of the possession of the child, or with intent to steal Child-stealing.

(*r*) 24 & 25 Vict. c. 100, s. 54.

(*s*) *Ibid.* s. 55.

(*t*) *R. v. Olfert*, 10 Cox, 402.

(*u*) *R. v. Hibbert*, L. R. 1 C. C. R. 184; 38 L. J. (M.C.) 61.

(*v*) *R. v. Prince*, L. R. 2 C. C. R. 154; 44 L. J. (M.C.) 122.

(*w*) *R. v. Handley*, 1 F. & F. 648.

any article upon or about the child, or, with any such intent, to receive or harbour any such child, knowing the same to have been so led away, &c., is a felony, punishable by penal servitude to the extent of seven years. But persons claiming any right to the possession of the child do not fall within the statute (x).

Child-abandoning, or exposing.

To unlawfully abandon or expose any child under the age of two years in such manner that its life is endangered or its health is, or is likely to be, permanently injured, is a misdemeanor, punishable by penal servitude to the extent of five years (y).

(x) 24 & 25 Vict. c. 100, s. 56.

(y) Ibid. s. 27 ; v. *R. v. Falkingham*, L. R. 1 C. C. R. 222 ; 39 L. J. (M. C.) 47, shewing how little will warrant a conviction.

CHAPTER III.

ASSAULTS, ETC.

UNDER this head we shall consider all the remaining offences against the person.

COMMON ASSAULT.

An *assault* is an attempt or offer to commit a forcible **Assault.** crime against the person of another ; for example, presenting a loaded gun at a person. It will be noticed that there need not be an actual touching of the person assaulted. But mere words never amount to an assault (2).

The combatants at a prize fight and all persons aiding and abetting therein are guilty of an assault for which an indictment will lie. But (Lord Coleridge, C. J., Pollock, B., and Matthew, J., dissenting) the mere voluntary presence of persons at a prize fight does not necessarily make them guilty of an assault, as aiding and abetting (a).

The unlimited character of this crime makes it a **Comprehensiveness of the crime.** convenient means of punishing a variety of crimes which do not at first sight seem to be assaults, at least not in the popular signification of the term ; for example, putting a child into a bag, hanging it on some palings, and there leaving it (b).

(2) 1 Hawk. c. 62, s. 1.

(a) *R. v. Coney*, 8 Q. B. D. 534 ; 51 L. J. (M.C.) 66 ; 46 L. T. N. S. 307 ; 30 W. R. 678.

(b) *R. v. March*, 1 C. & K. 496.

Battery.

A *battery* is not necessarily a forcible striking with the hand or stick or the like, but includes every touching or laying hold (however trifling) of another person, or his clothes, in an angry, revengeful, rude, insolent, or hostile manner; for example, jostling another out of the way. Thus, if a man strikes at another with a cane or fist, or throws a bottle at him, if he miss, it is an *assault*; if he hit, it is a *battery*.

Effect of consent.

As a rule, consent on the part of the complainant deprives the act of the character of an assault, unless, indeed, non-resistance has been brought about by fraud. But the fact of consent will in general be immaterial when an actual battery or breach of the peace has been committed (*e*).

Assault the subject also of civil proceedings.

A common assault is also the subject of a civil action for damages; and the party injured may either prosecute or bring his action first. The court will not, however, pass judgment during the pendency of a civil action for the same assault (*d*), the reason obviously being that otherwise the issue of the civil action might be prejudiced.

Punishment, or compensation.

A common assault, that is, a mere assault which may or may not have proceeded to a battery, is a misdemeanor, punishable by imprisonment not exceeding one year (*e*). But the justice of the case is often more adequately met by compensation to the person injured. Therefore, with the assent of the prosecution, if the circumstances appear to warrant that course, the court may allow the defendant to plead guilty, and inflict upon him a merely nominal fine, on the understanding that he shall make a compensation to the prosecutor (*f*).

(c) Broom, 917.

(d) *R. v. Mahon*, 4 A. & E. 575.

(e) 24 & 25 Vict. c. 100, s. 47.

(f) *R. v. Roxburgh*, 12 Cox, 8.

Common assaults are usually disposed of by the magistrates assembled at petty sessions. The limit of punishment in ordinary cases of such summary conviction is a fine of £5 or imprisonment not exceeding two months; but in some more serious cases of assault upon females or boys whose age does not exceed fourteen years, the limits are £20 and six months (*g*). Summary proceedings.

When a husband is convicted summarily or otherwise of an aggravated assault upon his wife, the court or magistrate, if satisfied that the future safety of the wife is in peril, has power to make an order having the effect of a judicial separation; and may also order the husband to pay a weekly sum for the support of the wife, and to give the custody of children under the age of ten years to the wife. The orders for alimentary payments and for custody of the children are revocable in case of adultery of the wife. And all orders under these powers are subject to appeal to the Probate and Admiralty Division of the High Court of Justice (*h*). Judicial separation.

The magistrates have not power to hear and determine any assault involving a question of title to lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice. And if the assault is accompanied by an attempt to commit a felony, or, in the opinion of the magistrates, is a fit subject for prosecution by indictment, they may abstain from any adjudication, and leave the case to be prosecuted by indictment (*i*).

As to the evidence on the part of the accused, it may be stated generally that the same facts which would reduce a homicide to misadventure are a good Defence.

(*g*) 24 & 25 Vict. c. 100, ss. 42, 43.

(*h*) 41 & 42 Vict. c. 19.

(*i*) 24 & 25 Vict. c. 100, s. 46.

defence upon an indictment for a battery (*j*). Other defences are, that it was committed merely in self-defence, or in the proper administration of moderate correction, or in the execution of public justice, or in some lawful game. Inasmuch as it would not be right that the defendant should be punished twice for the same offence, it is a good defence that the matter has been disposed of by two justices: provided that if the defendant has been convicted he has paid the penalty and suffered the imprisonment awarded; if dismissed, it does not matter whether it was on the ground of justification, the trifling character of the offence, or because it was not proved (*k*).

So much for *common* assaults; we have now to deal with those of an aggravated character.

ACTUAL AND GRIEVOUS BODILY HARM.

Actual bodily
harm.

If the assault occasions *actual bodily harm* the punishment is penal servitude to the extent of five years (*l*) for the misdemeanor. Actual bodily harm would include any hurt or injury calculated to interfere with the health or comfort of the prosecutor; it need not be an injury of a permanent character (*m*). Nor is it necessary that there should be an intention to injure particular persons. Thus, where the prisoner shortly before the conclusion of a performance at a theatre, with the intention and with the result of causing terror in the minds of persons leaving the theatre, put out the gas lights on a staircase which a large number of such persons had to descend in order to leave the theatre, and also placed an iron bar across a doorway through which they had in leaving to pass, and thereupon a panic seized a large portion of the

(*j*) Arch. 718.

(*k*) 24 & 25 Vict. c. 100, ss. 44, 45.

(*l*) Ibid. s. 47.

(*m*) Arch. 718.

audience, and they rushed in fright down the staircase, forcing those in front across the iron bar, and thus several of the audience were thrown down or otherwise severely injured, it was held that the prisoner was rightly convicted of unlawfully and maliciously inflicting grievous bodily harm (n).

Unlawfully and maliciously *wounding* or inflicting any *grievous bodily harm* upon any other person, with or without any weapon or instrument, is a misdemeanor, punishable by penal servitude to the extent of five years (o). If any person (a) wound, (b) cause grievous bodily harm, (c) shoot at, or (d) attempt to shoot at any other person, with intent to (a) maim, (b) disfigure, or (c) disable any person, or (d) to do some other grievous bodily harm to him, or (e) to resist or prevent the lawful apprehension of any one, he is guilty of a felony, punishable by penal servitude to the extent of life (p).

To constitute a *wounding*, the continuity of the skin must be broken. The nature of the instrument is immaterial, whether it be a stab by a knife, a kick, or a gunshot wound, &c. (q).

To *maim* is to injure any part of a man's body, which may render him less capable of fighting. The injury is termed *mayhem*.

The term "*disfigure*" explains itself. To *disable*, refers to the causing of a permanent, and not merely a temporary disablement (r).

The *grievous bodily harm* need not be either per-

(n) *R. v. Martin*, L. R. 8 Q. B. D. 54; 51 L. J. (M.C.) 36; 45 L. T. N. S. 444; 30 W. R. 106.

(o) 24 & 25 Vict. c. 100, s. 20.

(p) *Ibid.* s. 18.

(q) *R. v. Wood*, 1 Mood. C. C. 278; *R. v. Briggs*, *ibid.* 318.

(r) *R. v. Boyce*, 1 Mood. C. C. 29.

manent or dangerous, so long as it seriously interferes with health or comfort (*s*).

The intent.

The intent can of course only be proved by presumptive evidence gathered from the facts of the case. The intent need not be to maim, &c., the particular person who is injured; thus, if a person intending to inflict grievous bodily harm on A., wounds B., he is guilty of wounding with intent, &c. (*t*).

ASSAULT WITH INTENT TO COMMIT A FELONY.

Assault with felonious intent.

This crime is a misdemeanor, punishable with imprisonment not exceeding two years. If the intent cannot be proved, the defendant may be convicted of a common assault (*u*).

ATTEMPT TO CHOKE, ETC., WITH INTENT, ETC.

Attempt to choke, &c., with intent, &c.

Whosoever attempts to *choke, suffocate, or strangle* any other person, or by any means calculated to choke, &c., renders any other person insensible, unconscious, or incapable of resistance, with *intent* to enable himself or any other person to commit, or assist in committing, any indictable offence, is guilty of felony, and punishable with penal servitude to the extent of life, with or without whipping in addition (*v*).

To drug, &c., with intent, &c.

With like intent, to apply, or administer, or cause to be taken, or to attempt to administer, &c., or to attempt to cause to be administered, &c., any chloroform, laudanum, or other *stupefying or overpowering drug*, matter, or thing, is a felony, punishable in the same way, with the exception of the whipping (*w*).

(*s*) *v. R. v. Ashman*, 1 F. & F. 88.

(*t*) *R. v. Stopford*, 11 Cox, 643.

(*u*) 24 & 25 Vict. c. 100, s. 38.

(*v*) *Ibid.* s. 21; 26 & 27 Vict. c. 44.

(*w*) 24 & 25 Vict. c. 100, s. 22.

ADMINISTERING POISON, ETC.

To administer, &c., any poison, or other destructive or noxious thing, so as thereby to endanger life or to inflict grievous bodily harm, is a felony, punishable by penal servitude to the extent of ten years (x). If the administering, though it does not so endanger life or inflict harm, is with intent to injure, aggrieve, or annoy the person, the offence is a misdemeanor, punishable by penal servitude to the extent of five years (y). A person indicted for the first offence may be found guilty of the second (z).

Administering
poison, &c.

EXPLOSIVE OR CORROSIVE SUBSTANCES.

By explosion of gunpowder or other explosive substance, to burn, maim, disfigure, disable, or do any grievous bodily harm to any person, is a felony, punishable by penal servitude to the extent of life (a). The same punishment is awarded for causing any gunpowder, or other explosive substance, to explode, or sending or delivering to, or causing to be taken or received by, any person, any explosive or other dangerous or noxious thing, or putting or laying at any place, or throwing at or upon, or otherwise applying to any person any corrosive fluid or any destructive or explosive substance, with *intent* to burn, maim, disfigure, or disable, or do any grievous bodily harm to any person, and this whether any bodily injury be effected or not (b). If the gunpowder or other explosive substance is placed in, thrown in, into, upon, against, or near any building, ship, or vessel, with intent to do any bodily injury to any person, whether such purpose be effected or not, the offender is guilty of a felony,

Injuring by
explosive,
corrosive, or
other destruc-
tive sub-
stances.

(x) 24 & 25 Vict. c. 100, s. 23.

(y) Ibid. s. 24.

(z) Ibid. s. 25.

(a) Ibid. s. 28.

(b) Ibid. s. 29.

punishable by penal servitude to the extent of fourteen years (c).

ENDANGERING SAFETY OF RAILWAY PASSENGERS.

Acts endanger-
ing safety of
railway
passengers :
felonies,

The following acts are felonious, punishable by penal servitude to the extent of life :—

(i.) To put or throw upon or across any railway any wood, stone, or other thing ; (ii.) to take up, remove, or displace any rail, sleeper, or other thing belonging to a railway ; (iii.) to move or divert any points or other machinery belonging to any railway ; (iv.) to make, or shew, hide or remove any signal or light upon or near to any railway ; (v.) to do or cause any other thing to be done with intent to endanger the safety of passengers (d) ; or (vi.) to throw against or into any railway engine, carriage, or truck, any wood, stone, or other thing, with intent to injure or endanger the safety of any person in the train (e). If committed by a young person, these offences may be dealt with summarily and punished by fine or imprisonment for three months ; and in the case of a male under fourteen years of age with a whipping (f).

misdemeanor

It is a misdemeanor, punishable with imprisonment not exceeding two years, by any unlawful act, or by any wilful omission or neglect, to endanger the safety of any person conveyed or being in or upon a railway, or to aid or assist therein (g).

As to injuries from Furious Driving, v. p. 144.

(c) 24 & 25 Vict. c. 100, s. 30.

(d) Ibid. s. 32.

(e) Ibid. s. 33.

(f) 42 & 43 Vict. c. 49, s. 11. v. p. 483.

(g) 24 & 25 Vict. c. 100, s. 34.

ASSAULTS, ETC., CONNECTED WITH WRECKS.

To assault, and strike or wound any magistrate, ^{Assaulting those preserv-} officer, or other person lawfully authorized in, or on ^{ing, &c., wrecks.} account of his exercising his duty in the preservation of any vessel in distress, or any wrecked vessel or goods, is a misdemeanor, punishable by penal servitude to the extent of seven years (*h*).

To impede any person endeavouring to escape from ^{Impeding escape.} a wreck or vessel in distress, or endeavouring to save another, is a felony, punishable by penal servitude to the extent of life (*i*).

FORCING SEAMEN ON SHORE.

For a master or other person belonging to a British ^{Forcing seamen on shore.} ship wrongfully to force on shore and leave behind, or otherwise wilfully and wrongfully to leave on shore or at sea, any seaman or apprentice, before the completion of the voyage for which he is engaged, or the return of the ship to the United Kingdom, is a misdemeanor (*j*). So also is it to discharge or leave behind any seaman or apprentice in any place abroad, without obtaining ^{Unlawfully leaving seamen behind.} the proper sanction specified in the Act (*k*). Each of these misdemeanors is punishable by fine and imprisonment, or may be dealt with on summary conviction, and, in that case, is punishable by imprisonment not exceeding six months, or a penalty not exceeding £100 (*l*).

ASSAULTS ON OFFICERS.

To assault, resist, or wilfully obstruct any peace ^{Assaults on peace officers.} officer in the due execution of his duty, or any person acting in aid of such officer, or to assault any person with intent to resist or prevent the lawful apprehension

(*h*) 24 & 25 Vict. c. 100, s. 37.
 (*i*) Ibid. s. 17.
 (*j*) 17 & 18 Vict. c. 104, s. 206.
 (*k*) Ibid. s. 207.
 (*l*) Ibid. s. 518.

of oneself or of any other person for any offence, is a misdemeanor, punishable by imprisonment not exceeding two years (*m*).

ASSAULTS ON OTHERS IN THE EXECUTION OF THEIR DUTY.

Assaults, &c.,
on clergymen.

Clergymen.—By threats or force to obstruct or prevent a clergyman or other minister in or from exercising his functions, or (b) to strike, or offer violence to one so engaged, or (c) to arrest, even upon civil process, one so engaged, to the knowledge of the accused, going to or coming from such performance, is a misdemeanor, punishable by imprisonment not exceeding two years (*n*).

Gamekeeper, v. p. 149.

ASSAULTS ON THOSE IN A DEFENCELESS POSITION.

Assaults on,
neglect of,
apprentices or
servants.

Apprentices or Servants.—Whosoever, being legally liable either as master or mistress to provide for any apprentice or servant necessary food, clothing, or lodgings, wilfully and without lawful excuse refuses or neglects to do so, or (b) unlawfully and maliciously does or causes to be done any bodily harm, so that the life of the apprentice or servant is likely to be permanently injured, is guilty of a misdemeanor, and is punishable by penal servitude to the extent of five years (*o*).

Neglecting or
ill-using
lunatics.

Lunatics.—Abusing, ill-treating, or wilfully neglecting a patient in a private asylum, by any person employed therein, or any single patient by any one having charge of or attending upon such lunatic, is a misdemeanor, or punishable on summary conviction by

(*m*) 24 & 25 Vict. c. 100, s. 38. v. also 34 & 35 Vict. c. 112, s. 12.
For assaulting, &c., officers of the customs, v. p. 121.

(*n*) 24 & 25 Vict. c. 100, s. 36.

(*o*) Ibid. s. 26.

forfeiture not exceeding £20 (*p*). A person who takes a house where a lunatic lives with him, and the household of which he supports, is a person having the charge of a lunatic (*g*). So, also, is the striking, wounding, ill-treating, or wilful neglect of any lunatic confined in a county or public asylum by any person employed therein (*r*). A similar provision is made with regard to persons confined in asylums for criminal lunatics (*s*).

FALSE IMPRISONMENT.

False imprisonment is a misdemeanor at common law, punishable by fine or imprisonment, or both. All that the prosecutor has to prove is the imprisonment; it is for the defendant to justify what he did (*t*). A count for a common assault is usually added.

Every confinement or restraint of the liberty of a person is an imprisonment; for example, by detaining a man in the streets. Though a party, on being shewn a magistrate's warrant, goes willingly at the desire of a constable, this is an imprisonment which the constable may be called upon to justify (*u*).

We shall see under the title "Arrest" in what cases one person is justified in detaining another (*v*).

(*p*) 16 & 17 Vict. c. 96, s. 9.

(*g*) *R. v. Smith*, 14 Cox, 398.

(*r*) 16 & 17 Vict. c. 97, s. 123.

(*s*) 23 & 24 Vict. c. 75, s. 13.

(*t*) Arch. 751.

(*u*) *Chinn v. Morris*, 2 C. & P. 361.

(*v*) As to Indecent Assault, v. p. 181; Assaults in Violation of Trade, v. p. 127; Spring Guns, &c., v. p. 150.

PART III.

OFFENCES AGAINST INDIVIDUALS—THEIR PROPERTY.

CHAPTER I.

LARCENY.

Definition of
larceny.

LARCENY or theft may be defined as "the wilfully wrongful taking *possession* of the goods of another with intent to deprive the owner of his *property* in them" (w).

Larceny,
simple or
compound.

Larceny is either Simple or Compound. Compound, or, as it is termed, "mixed" or "complicated" larceny, differs from simple larceny merely in that the former is

(w) Rosc. 634; Fitz. St. 126. This definition, taken from Roscoe's Evidence in Criminal Cases, with a modification suggested by Sir James Stephen, may not at first sight appear to indicate all the elements of larceny. An ordinary definition is something of this sort: "A taking and carrying away of the personal goods of another of any value, against the will or without the consent of the owner, without any *bond fide* claim of right, with a felonious intent."—Arch. Quarter Sessions. But the definition in the text, besides avoiding certain defects, contains all the essentials set out in the second definition. Thus "without any claim of right, by the taker" is included in the part relating to the intent; "against the will of the owner" in "wrongful"; "carrying away" in "taking possession."

As an example of the definitions contained in the recent bill for establishing a Criminal Code we may instance the following definition of Theft:—

"Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent

to deprive the owner or any person having any special property or interest therein permanently of such thing, or of such property, or interest;

to pledge the same or deposit it as security;

to part with it under a condition as to its return which the person parting with it may be unable to perform;

to deal with it in such a manner that it cannot be restored in the condition in which it was at the time of such taking and conversion."

accompanied with circumstances of aggravation. We shall defer the consideration of these aggravated cases until the simple crime has been dealt with.

The existing statute law on the subject of larceny and kindred offences is contained in one of the Criminal Consolidation Acts, 1861 (*x*).

To understand the definition we have given, and to be prepared to distinguish the offences of larceny, embezzlement, and obtaining by false pretences, the line between which is very finely drawn, it will be necessary to inquire what is signified by "possession," what by "property."

Possession extends not only to those things of which Possession. we have manual prehension, but those which are in our house, on our land, or in the possession of those under our control, as our servants, children, &c. (*y*). *Property*, Property. in the sense of the definition, is "the right to the possession, coupled with an ability to exercise that right" (*z*).

To explain the nature of the crime it will be convenient to consider separately the component parts of the definition under the following heads:—

- i. What kinds of property may be the subjects of larceny.
- ii. What constitutes a wilfully wrongful taking possession of another's goods.
- iii. What must be the intent.

i. The subjects of larceny.

Though it may be said that there is not any tenable ground for making some kinds of property incapable Property which may be the subject of larceny.

(*x*) 24 & 25 Vict. c. 96. In the present chapter the quotation merely of a section must be understood to refer to that Act.

(*y*) Rosc. 635; v. *R. v. Reed*, 23 L. J. (M.C.) 25.

(*z*) Rosc. 635.

of being the subjects of larceny, for a long time there were many of such serious exceptions. Some still continue, while in other cases the stealing is dealt with in an exceptional way (a). The goods must, in the absence of any express statutory enactment, be *personal* goods. This is the only kind of property which can be the subject of larceny at common law. As to other kinds:—

First exclusion
—things real,
&c.

(a). The first and chief example of the common law exclusion is—Things *real*, as lands and houses; and things attached or *belonging to the realty*, as trees, grass, the stones or lead of a house; also *title deeds* and other writings relating to real estate, inasmuch as they savour of the realty, and pass like real property to the heir or devisee. If the rights of the owner of such property are violated, he must seek a remedy in a civil action of trespass. He cannot, as a rule (see exceptions below), appeal to the criminal law for the punishment of the offender. But if the things are severed from the land, &c., *e.g.*, mown grass, and then feloniously taken away, these may be made the subjects of an indictment for larceny, inasmuch as by the severance they have become personal goods. However, to give them this quality an interval must have elapsed between the severance and the removal, so that the acts be perfectly distinct. And in this interval the wrong-doer must have intended to have abandoned the wrongful possession begun at the time of the severance; for example, it will not be larceny to sever and then conceal till one can conveniently return and carry away, however long the interval may be, for the whole is regarded as one continuous act (b).

(a) "There can be no good reason why stealing a dog, worth perhaps many pounds, and regarded by his owner with strong personal regard, should be less criminal than stealing the dog's collar, worth perhaps half-a-crown, and regarded with no feeling whatever."—Fitz. St. 138. Yet we shall find that the treatment of the two cases is quite different, and the punishment disproportionate.

(b) *R. v. Townley*, L. R. 1 C. C. R. 315; 40 L. J. (M.C.) 144. *R. v. Read*, L. R. 3 Q. B. 131; 47 L. J. (M.C.) 50.

The following are the statutory modifications of the rule excluding this class of property (c):—

a. Materials of buildings, fixtures, &c.—To steal or to ^{Materials, fixtures, &c.} rip, cut, sever, or break, with intent to steal, any glass or wood work belonging to any building whatsoever; or any lead, iron, copper, brass, or other metal; or any utensil or fixture respectively fixed in or to any building whatsoever; or anything made of metal or fixed in any land, being private property, or in any square or street, or in any place dedicated to the public use or ornament, or in any burial-ground, is punishable as simple larceny (*d*).

β. Mines, &c.—To steal, or sever with intent to steal, ^{Ore, coal.} the ore of any metal, or any manganese, black lead, &c., or any coal from any mine, bed, or vein, is a felony, punishable by imprisonment not exceeding two years (*e*).

The same consequences attend frauds of a similar nature by any one employed about the mine (*f*).

γ. Trees.—To steal, or destroy, or damage with intent ^{Trees.} to steal, any tree, sapling, shrub, or underwood growing in a park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house, if the injury amounts to the value of £1; or if growing elsewhere, to the value of £5, is a felony punishable as simple larceny (*g*). If the injury is to the value of 1s., wherever the tree, &c., may be growing, the case may be dealt with summarily, and punished

(c) "The law, as now regulated by 24 & 25 Vict. c. 96, excepts from the rule that real property cannot be the subject of larceny every sort of real property likely to be stolen, such as fixtures, trees, fences, vegetable productions, and minerals"—but still land itself continues to be incapable of being stolen, though for no valid reason—"suppose that a man unlawfully and with intent to defraud, builds a wall in such a manner as to inclose a strip of land to which he knows he has no right, why should he not be indicted for stealing the land?"—Fitz. St. 55, 132.

(d) s. 31.

(e) s. 38.

(f) s. 39.

(g) s. 32.

for the first offence, by fine not exceeding £5 above the injury done; for the second, imprisonment not exceeding twelve months; on a third conviction, the offence is a felony, punishable as simple larceny (*h*).

Plants, fruit, &c. *δ. Plants, &c.*—To steal, or destroy, or damage with intent to steal, any plant, root, fruit, or vegetable production growing in any garden, orchard, hothouse, &c., is punishable on summary conviction by imprisonment not exceeding six months, or fine not exceeding £20. The second offence is punishable as simple larceny (*i*).

Deeds, &c. *ε. Deeds, &c.*—To steal, or for any fraudulent purpose to destroy, cancel, obliterate, or conceal any or part of any documents (*j*) of title to lands, is punishable by penal servitude to the extent of five years (*k*).

Second exclusion—Choses in action. (*b*.) A second exclusion by the common law is of *choses in action* (*i.e.*, mere rights to demand, by action or other proceedings, property; or evidence of such rights).

This exclusion virtually a thing of the past. But without delaying at the common law view of the matter, it may be stated that the statutory exceptions to it include “every chose of action that has ever been known to be stolen, or which occurred to the mind of the draftsman as capable of being stolen” (*l*). Thus, to steal, or for any fraudulent purpose to destroy, cancel, or obliterate the whole or any part of any *valuable security*, other than a document of title to lands, is a felony, of the same nature and degree, and punishable in the same manner, as if the offender had stolen any chattel of like value with the sum re-

(*h*) s. 33.

(*i*) s. 36.

(*j*) As to Wills, v. p. 203.

(*k*) s. 28. As to concealment of instruments of title, or falsification of pedigree by vendor or mortgagor, or his solicitor or agent, v. 22 & 23 Vict. c. 35, s. 24.

(*l*) Fitz. St. 55.

presented by the security (*m*). The term "valuable security" is declared to include any order, exchequer, admittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank; and also any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state; and any document of title to (lands *v. supra*) goods (*n*). Of course under these terms will be included all ordinary cheques, promissory notes, money orders, &c.

Notwithstanding the comprehensiveness of this provision, it will be better in some cases to describe the property stolen as so much paper, &c.; for example, if only half a note is stolen (*o*). Notes, &c., sometimes to be described as paper.

It will be convenient to notice here the other exceptional cases of stealing written instruments.

Wills.—To steal, or for any fraudulent purpose *Wills.* destroy, cancel, obliterate, or conceal, either during the life or after the death of the testator, any will, codicil, or other testamentary instrument, whether of real or personal property, is a felony, punishable by penal servitude to the extent of life. The criminal proceeding does not affect the civil remedy; and no person is liable to be convicted if, before he is charged with the offence, he has first disclosed such act on oath in consequence of the compulsory process of a court of

(*m*) s. 27.

(*n*) s. 1.

(*o*) *R. v. Mead*, 4 C. & P. 535.

law or equity, or in compulsory examination or deposition in bankruptcy or insolvency (*p*).

Records.

Records.—To steal, or for any fraudulent purpose to remove, injure, obliterate, &c., records, or other documents belonging or relating to a court of record or equity, or of a public office, is a felony punishable by penal servitude to the extent of five years (*q*).

A third exclusion.

(*c*.) A third exclusion of the common law is of *things which are not the subjects of property at all*.

The chief example of this is in the case of certain animals. But, in addition to these, in certain other things there is no property, as a corpse. So it was said of treasure-trove, waifs, &c. (*r*). Nor can water in pipes be the subject of larceny (*s*).

Animals, when the subjects of larceny.

Animals.—At common law there can be no larceny of animals in which there is no property. Such are beasts that are *feræ naturæ* and unreclaimed, *e.g.*, deer, hares, or conies in a forest, chase, or warren; fish in an open river or pond; or wild fowls, rooks for instance, at their natural liberty; and this notwithstanding that the right to take the animals in the particular place is enjoyed exclusively by one or more persons. Thus it is not larceny to shoot and take a hare on B.'s land; the offence will be one against the game laws. On the other hand, dead animals, whether to be used for food or not, may be the subjects of larceny. But here, with regard to shooting and taking by the same person, the rule noticed above as to a break in the proceedings by abandoning possession must be observed (*t*).

(*p*) s. 29. This provision as to non-liability refers also to the case of documents of title to lands, v. p. 202.

(*q*) s. 30.

(*r*) But v. p. 70.

(*s*) *Fergus v. O'Brien*, 11 Q. B. D. 21; 52 L. J. (M.C.) 70; 31 W. R. 643.

(*t*) v. p. 200. See also 43 & 44 Vict. c. 35; and 44 & 45 Vict. c. 51.

Again, if the animals are evidently reclaimed, or are practically under the care and dominion of any person, and may serve for food, they may be the subjects of larceny. So, also, may be valuable domestic animals, as horses; and all animals *domitæ naturæ* which serve for food, as swine, poultry, and the like; and the product of any of them, as eggs, milk, wool, &c. But other animals which do not serve for food are not the subjects of larceny, *e.g.*, dogs, bears, foxes, &c., though they may be recovered in a civil action.

Such is the common law; it has thus been modified by statute:—

a. Deer.—To unlawfully and wilfully course, hunt, Deer. snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept in an uninclosed part of a forest, chase, or purlieu is punishable, on summary conviction, by penalty not exceeding £50. The second offence is a felony, punishable by imprisonment not exceeding two years (*u*). If the deed is done in an inclosed place, the first or any offence is a felony, punishable by imprisonment not exceeding two years (*v*). To have in possession, without satisfactorily accounting for the same, any deer, or the head, skin, or other part thereof, or a snare or engine for taking deer (*w*), or (*b*) to set or use any such snare, or destroy any part of the fence of any land where any deer are kept (*x*), is punishable on summary conviction.

β. Hares, &c.—To unlawfully and wilfully, between Hares, &c. the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit in a warren or ground (whether inclosed or not) lawfully used for the breeding or keeping

(*u*) s. 12.

(*v*) s. 13.

(*w*) s. 14.

(*x*) s. 15.

of hares or rabbits is a misdemeanor. To do the above at any other time, or at any time to set a snare, is punishable, on summary conviction, by a penalty not exceeding £5 (*y*).

Fish.

γ. Fish, &c.—To unlawfully and wilfully take or destroy any fish in any water adjoining or belonging to the dwelling-house of the owner of such water is a misdemeanor; in water not so situated, but which is private property, or in which there is any private right of fishery, is punishable on summary conviction, by a penalty not exceeding £5 above the value of the fish (*z*).

Oysters.

To steal any oysters or oyster brood, layer, or fishery, being the property of any other person, and sufficiently marked out, or known as such, is a felony punishable as in the case of simple larceny. To use any net, instrument, &c., for taking oysters, or to drag upon the ground of such fishery, is a misdemeanor, punishable by imprisonment not exceeding three months (*a*).

Dogs.

δ. Dogs.—Stealing a dog is punishable, on summary conviction, by imprisonment not exceeding six months, or with a penalty not exceeding £20 above the value of the dog. A second offence is a misdemeanor, punishable by imprisonment not exceeding eighteen months (*b*). The same consequences, without the alternative of imprisonment for the first offence, attend the unlawfully having possession of a stolen dog or its skin, knowing it to have been stolen (*c*). To corruptly take money for aiding any person to recover a dog stolen, or in the possession of any person not the

(*y*) s. 17.

(*z*) s. 24.

(*a*) s. 26; see also 31 & 32 Vict. c. 45, pt. 3, ss. 28, 42, 43, 51, 52, 55.

(*b*) s. 18.

(*c*) s. 19; see also s. 22.

owner thereof, is a misdemeanor, punishable by imprisonment not exceeding eighteen months (*d*).

e. Horses, Cows, Sheep, &c.—One reason for increasing the severity of the punishment is the ease with which the crime can be committed, so that the deterrent effect of the consequences may be proportioned to the inducements to commit it.* On this account the punishment imposed by statute for stealing any of these animals exceeds that for simple larceny at common law. Horses and cattle.

To steal a horse, mare, gelding, colt, filly; bull, cow, ox, heifer, calf; ram, ewe, sheep, or lamb, is a felony, punishable by penal servitude to the extent of fourteen years (*e*).

To wilfully kill any animal, with intent to steal the carcase, skin, or any part, is a felony, punishable as if the offender had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have been felony (*f*). Killing with intent to steal the carcase, &c.

Further with regard to the goods.—As a rule, the value of the thing stolen is no longer of any moment in larceny. Except, indeed, where some amount is specially mentioned in the statute as of the essence of the crime, for example, in the case of trees (*g*); or where the value of the thing determines whether the case may be dealt with in a summary way (*h*). And, of course, if it appears at the trial that the theft was of considerable extent, this will be one element which will make the offence more serious, and will therefore influence the court in its judgment. But now in ordi- Value of the goods stolen.

(*d*) s. 20.

(*e*) s. 10.

(*f*) s. 11.

(*g*) ss. 32, 33; v. *supra*.

(*h*) 42 & 43 Vict. c. 49, s. 12, and Sched. I.

nary cases no statement of value or price is necessary in the indictment (*i*). Formerly it was otherwise. There was a division into *grand* and *petty* larceny: the former comprising cases of larceny of goods of the value of twelve pence and upwards; such offences being attended with more serious punishment than petty larcenies, which comprised cases of theft where the value did not reach that sum. But now the distinction is abolished, and every simple larceny is of the same nature, and subject to the same incidents as grand larceny was formerly (*j*). Though, to make a thing the subject of an indictment for larceny, it must be of *some* value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least (*k*).

Ownership of
the goods.

As to the description of the *ownership* of the goods.—The name of the owner must be given in the indictment, unless it be one of those cases in which the statute expressly declares this unnecessary, *e.g.*, of wills (*l*). In other than these exceptional cases it must be proved that the goods stolen are the absolute or special property of the person named in the indictment (*m*).

ii. *The wilfully wrongful taking possession.*

The wrongful
taking must be
"wilful."

The object of inserting "wilfully" before the "wrongful taking" is to distinguish the wrongful taking which constitutes larceny from the wrongful taking which merely affords ground for a civil action. Thus a person, imagining that he has the right, taking the goods of another under an illegal distress is liable to civil but not to criminal proceedings. In any case, if the taking is under colour of right, though the

(i) 14 & 15 Vict. c. 100, s. 24.

(j) 7 & 8 Geo. 4, c. 29, s. 2, re-enacted by 24 & 25 Vict. c. 96, s. 2.

(k) *R. v. Morris*, 9 C. & P. 349.

(l) s. 29.

(m) As to the person in whom the ownership must be laid, v. p. 337.

supposed right be without foundation, there is no larceny (*n*).

The taking is either actual or constructive:—*Actual*, The taking, actual or constructive. when the thief directly takes the goods out of the possession of the owner or his bailee, *invito domino* (*o*), by force or by stealth, or the like: *Constructive*, when the owner delivers the goods, but either does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by fraud and in pursuance of a previous intent to steal them (*p*).

The law on *constructive taking* may be considered under the following heads:— Constructive taking.

(a.) Where, by the delivery, the owner of the goods passes not only the possession, but the right of property also.

(b.) Where the possession has been obtained *animo furandi*.

(c.) Where the possession was originally obtained *bond fide*, and without a felonious intent.

(d.) Where the delivery does not alter the possession in law.

(a.) *Where the right of property as well as the possession is parted with by the delivery*, there can be no larceny, however fraudulent are the means by which the delivery of the goods is procured. Property as well as possession parted with. Of course the person who committed the fraud is open to a charge for another offence, namely, obtaining goods by false

(*n*) v. p. 216.

(*o*) A slight apparent exception to the rule that the taking must be *invito domino*, occurs in the case of the owner receiving intimation of the proposed theft and resolving to allow it to be carried out in order to convict the thief. *R. v. Eggington*, 2 Leach, 913.

(*p*) Arch. 365. From this work is also taken the immediately following classification of cases.

pretences. If the property has once passed, no subsequent act by the person in whom the right of property has vested can be construed into larceny, whatever the intent of that person may be. Thus A. buys a horse from B., mounts it, says he will return immediately and pay. B. says, "Very well." A. rides away and never returns. There is no larceny, because the property as well as the possession is parted with (q). So in all cases of selling on credit; intrusting with money to get change, &c.

Authority of
servant to
part with
property and
possession.

It is the same if the property is passed by the servant of the owner, provided that the servant has authority to part with the property; but not if he has authority to part merely with the possession. Thus, if the servant of B. is authorized only to let out horses on hire, and he, in the case given above, parts with the property in the animal to A., it is larceny in A. (r).

Possession
obtained
animo fur-
andi.

(b.) *Where the possession of goods is obtained animo furandi* (s), by the offender employing some device; the owner not intending to part with the property in the goods, though he does with the temporary possession. This is larceny though there be a delivery in fact. Thus A. goes to B.'s shop, and says that C. wants some shawls to look at. B. gives A. some shawls for C. to select from. A. converts them to her own use. This is larceny in A., because, until the selection is made, only the possession and not the property is parted with. It is larceny, if the design of so converting to the accused's own use is present when possession is obtained; but it is not larceny if such design is conceived only subsequently to the rightfully obtaining possession (t).

(q) *R. v. Harvey*, 1 Leach, 467.

(r) *v. R. v. Middleton*, L. R. 2 C. C. R. 38; 42 L. J. (M. C.) 73.

(s) As to what constitutes *animus furandi* or felonious intent, v. p. 216.

(t) *R. v. Savage*, 5 C. & P. 143.

An example of larceny of this class is the practice of ring-dropping. The prisoner pretends to find a ring wrapped in paper appearing to be a jeweller's receipt for a "rich brilliant diamond ring." He, with his accomplices, offers to leave the ring with the victim if the latter will deposit his watch or some money as security for the return of the ring. The watch or money is taken away by the prisoner's party, and the victim finds that the value of the ring is much below that of the goods he has parted with (*u*). The fact that there is an actual delivery of goods does not divest the deed of the character of larceny, if the defendant having the *animus furandi* obtains them by frightening or threatening the owner, as, for example, in mock auctions (*v*). And it is immaterial that some money was at the time owing from the prosecutor to prisoner (*w*).

Some of the cases under this head which have been decided to be larceny shew how very narrow the line is between larceny and non-larceny or false pretences. Thus, when A. obtained from B. a sum of money under the false colour of winning a bet, it was held to be larceny, because at the time the defendant obtained the money from the prosecutor he parted with the possession only, and the property was to pass eventually only if the other party really won the wager (*x*).

(c.) *Where the possession of the goods is obtained lawfully and bona fide, without any fraudulent intention in the first instance.*—Though the person thus obtaining possession afterwards fraudulently appropriated the goods to his own use, he would not be guilty of larceny at common law. However, it would be otherwise if the possession was obtained by trespass, and then there

(*u*) *R. v. Patch*, 1 Leach, 238.

(*v*) *R. v. M'Grath*, L. R. 1 C. C. R. 205; 39 L. J. (M.C.) 7.

(*w*) *R. v. Lovell*, 8 Q. B. D. 185; 50 L. J. (M.C.) 91; 44 L. T. N. S.

319.

(*x*) *R. v. Robson*, R. & R. 413; *v. R. v. Wilkins*, 1 Leach, 520.

was a subsequent fraudulent appropriation, though there were no fraudulent intention at first (y).

Bailment.

In accordance with the above rule, in no case of bailment where the possession was at first obtained innocently, could the bailee be found guilty of larceny. But the legislature has interfered, and enacted that the fraudulent taking or converting any chattel, money, or valuable security by the bailee of such property to his own use, or to the use of some other person than the owner, although he do not break bulk or otherwise determine the bailment, is larceny (z). But a person cannot be convicted of larceny as a bailee unless the bailment be to re-deliver the very same chattel or money (a).

As we shall see, the Larceny Act deals specifically with the cases of certain persons who are intrusted with money or goods, *e.g.*, banker, broker, &c. The crime of embezzlement is also concerned with appropriations by those to whom property has been delivered, though not by the person who is wrongfully deprived (b).

Possession not altered by delivery.

(d.) *Where the delivery does not alter the possession in law*: in other words, where, although there is a delivery of the goods by the owner, yet the possession in law remains in him, the goods may be stolen by the person to whom they are thus delivered. Thus it is larceny at common law for a servant who has merely the care and oversight of the goods of his master, as the butler of the plate, to appropriate those goods. And here the felonious intention need not exist at the time of the delivery, inasmuch as the delivery is merely for custody, the possession legally remaining in the master.

(y) *R. v. Riley*, 22 L. J. (M.C.) 48.

(z) s. 3. See *R. v. Tonkinson*, 14 Cox, 603.

(a) *R. v. Hassell*, 30 L. J. (M.C.) 175.

(b) As to larceny by tenants or lodgers, v. p. 219.

The master must have been in possession; for if the goods are delivered to the servant for the master's use, and the servant does not deliver, but converts them to his own use, this is not larceny, but embezzlement; as if a shopman receives money from one of his master's customers, and, instead of putting it into the till, secretes it (c).

There are other cases in which the possession, though physically parted with, still remains unmoved in the eye of the law. For example, when the owner is present all the time the goods are in the physical possession of the accused, and has no intention of relinquishing his dominion, as when a lady handed a sovereign to the prisoner, asking him to procure her a ticket, and he ran off with it: he was convicted of larceny (d).

So a bare use of the goods of another does not divest the owner of his possession in law. Thus it is larceny for a person to fraudulently convert to his own use the plate which he is using at an inn (e).

The taking must be of another's goods. Therefore a person cannot steal his own goods, if they are in his own possession, though he defraud his creditors by the removal; but otherwise, if they are in the hands of a bailee, and the taking of them has the effect of charging the bailee (f). Taking one's own goods,

So, also, if one of several joint-tenants or tenants in common of personal goods disposed of them, it was not larceny at common law, for the disposer was already

(c) *R. v. Bull*, 2 Leach, 841.

(d) *R. v. Thompson*, 32 L. J. (M.C.) 53.

(e) A reference to the explanation of the term "possession" (p. 199) will shew that in the above cases the owner in strictness has not parted with the possession.

(f) *v. R. v. Wilkinson*, R. & R. 470.

in possession (*g*). But it has been enacted that if any member of a co-partnership, or one of two or more beneficial owners of property, steals any such property, he is liable to be dealt with as if he had not been in such position (*h*).

or those of
one's consort.

Until lately husband and wife, being one in law, could not steal each other's good; so that if the goods of the husband were taken with the consent or privity of the wife, it was not larceny, unless the taker was the avowterer of the woman (*i*). And so the avowterer could not be convicted merely of receiving the goods of the husband which had been taken by the wife alone and received by him from the wife (*j*). But now by the Married Women's Property Act, 1882, every woman, whether married before or after that Act, has in her own name, against all persons, including her husband, the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property had belonged to her as a *feme sole*. But no such criminal proceeding can be taken by any wife against her husband, while they are living together, concerning any property claimed by her; nor while they are living apart as to any act done by the husband, while they were living together, concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting his wife (*k*). In like manner a wife doing any act with respect to any property of her husband, which if done by the husband with respect to the property of the wife would make the husband liable to criminal proceedings by the wife, is

(*g*) This does not apply to corporations, because in them individual members have not the right of possession or property.

(*h*) 31 & 32 Vict. c. 116, s. 1.

(*i*) *R. v. Tolfree*, 1 Mood. C. C. 243. See also *R. v. Flatman*, 14 Cox, 396.

(*j*) *R. v. Kenny*, L. R. 2 Q. B. 307; 46 L. J. (M.C.) 156.

(*k*) 45 & 46 Vict. c. 75, s. 12.

liable to criminal proceedings by her husband (*l*). In any such proceedings by the wife against her husband, it is sufficient to allege such property to be the wife's property (*m*).

When does the appropriation of things *found* amount to an unlawful and felonious taking? The true rule was laid down in *R. v. Thurborn* (*n*). "If a man find goods that have been actually lost, and appropriate them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he take them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." Thus to make finding larceny, there must be on the part of the finder both this belief and this intention at the *time of the finding*.

As to the taking *physically* regarded.—In the "taking" we have included what is frequently considered as a separate ingredient of larceny—*carrying away* or *asportation*. This asportation must be proved as well as a bare taking. Thus to handle a bale of goods is not larceny; but the slightest removal will suffice; it is not necessary that the prisoner should succeed in carrying the goods away. Thus, removing the goods from the head to the tail of a waggon, with intent to steal; or, with like intent, drawing a book from a coat an inch above the pocket, though it fall back again, is enough to constitute an asportation (*o*). But there must be some severance; and, therefore, where the goods could not be carried off because of a string attaching them to the counter, the prisoner was acquitted (*p*).

(*l*) 45 & 46 Vict. c. 75, s. 16.

(*m*) Ibid. s. 12.

(*n*) 18 L. J. (M.C.) 140; 2 C. & K. 831.

(*o*) *R. v. Thompson*, 1 Mood. C. C. 78.

(*p*) 2 East, P. C. 556.

Attempt to
steal.

Not that in such cases the offender will be altogether out of the reach of the criminal law: he may be indicted for an attempt to steal; or upon the indictment for larceny he may be found guilty of, and punished for, an attempt (*q*). But he can be convicted of an attempt only where, if no interruption had taken place, the design would have been carried out successfully; therefore, putting one's hand into an empty pocket with intent to steal, will not constitute an attempt (*r*). Here again, however, though the prisoner cannot be convicted of the attempt, he is guilty of a common law misdemeanor.

iii. *The intent permanently to deprive the owner of his property—the animus furandi*—the felonious intent.

The felonious
intent.

This is an essential constituent of larceny, and therefore are excepted from criminal liability those who are merely trespassers. Thus, if I take my neighbour's horse out of his stables, and ride it in open day for a few miles, where I am well known, there would be a mere trespass, and no ground for a charge of larceny, however much I may be at enmity with my neighbour. So, also, are exempted those who take goods under a *bond fide* claim of right, however unfounded that claim may be; as if under colour of arrears of rent, although none is actually due, I distrain or seize my tenant's cattle; this may be a trespass, but is no felony.

As we have already noticed (*s*), the felonious intent must exist at the time of taking. The intent must, of course, be inferred from the circumstances of the case: among the more common *indicia* of this felonious intent being the doing the act clandestinely, the denying it when charged, &c. It will be for the jury to

(*q*) v. p. 17; 14 & 15 Vict. c. 100, s. 9.

(*r*) *R. v. Collins*, 33 L. J. (M.C.) 177.

(*s*) v. p. 210.

decide whether the felonious intent has been proved ; or, rather, whether the prisoner has established the absence of such intent ; for it is a general presumption of the law that when a party takes wrongful possession of goods belonging to another, his intent is to deprive the owner of them, that is, to steal them. Returning the goods is strong evidence that the intent was not felonious, though it is not conclusive evidence, inasmuch as the prisoner would be convicted if from other circumstances it is proved that the felonious intent was present at the time of taking, though it was afterwards abandoned.

It is not necessary that the taking should be *lucri causâ*, or with the object of gain of a pecuniary character. For example, it was held to be larceny for a man to take another's horse, back it into a pit, and thereby kill it, the object here being to screen an accomplice (t). And so a person was convicted of larceny who destroyed a letter in order to suppress inquiries as to behaviour supposed to be contained therein (u). But in such cases as these it is perhaps possible to extend the meaning of *lucri causâ* to any advantage to be obtained by the prisoner, on the commission of the crime ; and then this term could be applied to any case of larceny. An extreme example of this kind of advantage derived from the wrongful dealing with the goods of another is one which was formerly sufficient to constitute larceny, but which now is specially provided for by statute, namely, the case of servants supplying their master's horses, &c., with food additional to the quantity usually allowed. The later cases on the subject went so far as to establish that it was larceny, even if the intent of obtaining a private benefit (e.g., ease in looking after the horses) was nega-

(t) *R. v. Cabbage*, R. & R. 292.

(u) *R. v. Jones*, 2 C. & K. 236.

tived (*v*). The statute (*w*) enacts that such conduct shall be punished on summary conviction, by imprisonment not exceeding three months, or fine not exceeding £5 ; and that the magistrate may dismiss the case if he think it too trifling.

More than one count in the indictment, when allowed.

In the same indictment against the same person there may be inserted *several counts* for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts ; and it is lawful to proceed thereon for all or any of them (*x*). If, at a trial for larceny, it appears that the property alleged to have been stolen at one time was taken at different times, the prosecution is not required to elect upon which taking he will proceed, unless it appears that there were more than three takings, or that more than the space of six months elapsed between the first and last of such takings. In either of such last-mentioned cases the prosecution is required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings (*y*).

Conviction for embezzlement on indictment for larceny, and *vice versa*.

A person indicted for larceny is not to be acquitted because it is proved that he is guilty of embezzlement, and *vice versa* ; so that the prisoner will be punished for whichever of these crimes he is found guilty of by the jury, although he may have been indicted for the other (*z*).

Place of trial.

As to the *place of trial*.—The thief may be tried in any county of the United Kingdom in which he has

(*v*) *R. v. Privett*, 2 C. & K. 114.

(*w*) 26 & 27 Vict. c. 103, s. 1.

(*x*) s. 5.

(*y*) s. 6.

(*z*) s. 72.

any of the stolen or feloniously taken property, and this irrespective of the length of time since the commission of the larceny (*a*), for in the eyes of the law he is guilty of a taking in every county through or in which the goods have been taken by him (*b*).

The punishment for simple larceny, or for any felony made punishable as simple larceny, is—except in cases specially provided for in the Act, or provided for thereafter—penal servitude to the extent of five years (*c*). Additional punishment is awarded in most instances where the offender has been previously convicted, according to rules to be subsequently mentioned (*d*). Punishment.

The punishment for stealing by any tenant or lodger any chattel or fixture let to be used in or with the house or lodging, is imprisonment not exceeding two years. If the value of the property exceeds £5, penal servitude to the extent of seven years may be awarded (*e*).

Larceny by clerks or servants of goods belonging to, or in the possession or power of, their master or employer, is punishable by penal servitude to the extent of fourteen years (*f*).

COMPOUND OR AGGRAVATED LARCENY.

Larceny attended by circumstances of aggravation is punished more severely than simple larceny. This increased severity is the test to indicate what the law regards as aggravations. In compound larceny all the elements of simple larceny are present; and, in Larceny, compound or aggravated.

(*a*) s. 114.

(*b*) See further as to place of trial, p. 352; restitution of property, p. 451; apprehension of offenders, p. 317; costs, p. 466; summary jurisdiction in certain larcenies, p. 484.

(*c*) s. 4.

(*d*) v. p. 456.

(*e*) s. 74.

(*f*) s. 67.

addition to these, the special features which constitute the aggravation. If the prosecution fail to prove such additional circumstances, the prisoner may be found guilty of simple larceny.

Aggravations
enumerated.

“The principal aggravations now in force are either in respect of the *nature of the thing stolen*, as in the case of cattle (*g*), goods in the process of manufacture (*h*), and wills (*i*); or in respect of the *manner* in which they are stolen, as with or without arms and violence (*j*); or in respect of the *place* from which they are stolen, as from the person (*k*), in a dwelling-house to the value of £5 (*l*), in a church or chapel (*m*), from a ship in harbour (*n*), and from a ship in distress (*o*); or in respect of the *person* by whom they are stolen, as in the case of agents (*p*), bankers (*q*), and fraudulent trustees (*r*), servants (*s*), public officers (*t*), and persons previously convicted (*u*).”

Some of these have already been noticed; the others now demand our consideration.

(a.) *Goods in process of manufacture.*

Larceny of
goods in pro-
cess of manu-
facture.

The goods which are under the protection of the severer penalties are the following:—Woollen, linen, hempen or cotton yarn, or any goods or articles of silk,

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- (*g*) v. p. 207.
 - (*h*) v. p. 220.
 - (*i*) v. p. 203.
 - (*j*) v. p. 222.
 - (*k*) v. p. 225.
 - (*l*) v. p. 257.
 - (*m*) v. p. 256.
 - (*n*) v. p. 221.
 - (*o*) Ibid.
 - (*p*) v. p. 237.
 - (*q*) Ibid.
 - (*r*) Ibid.
 - (*s*) v. p. 219.
 - (*t*) v. p. 221.
 - (*u*) v. p. 456; Fitz. St. 138.

woollen, linen, cotton, alpaca, or mohair, or of any of these materials mixed with each other or with some other material. The stealing of any of these whilst laid, placed, or exposed during any stage, process, or progress of manufacture, in any building, field or other place, is punishable by penal servitude to the extent of fourteen years (x).

(b.) *From Vessels, Docks, &c.*

Stealing from vessels, barges, or boats of any description, in a haven, port of entry or discharge, or upon a navigable river or canal, or in a creek or basin communicating with any of the foregoing, is punishable by penal servitude to the extent of fourteen years. The same punishment attends stealing from a dock, wharf, or quay adjacent to any such haven, port, river, canal, creek or basin (y).

Larceny from vessels, docks, &c.

(c.) *From Vessels in distress or wrecked.*

It is said that at common law there could be no larceny of wrecks, inasmuch as in such a person could not have determinate property. The state of affairs is now completely altered. The law, taking into consideration the gravity of the offence of stealing from those in a defenceless and distressed state, visits such conduct with more severe punishment. To plunder or steal any part of a ship or vessel in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, is punishable by penal servitude to the extent of fourteen years (z).

Larceny from wrecks.

(d.) *By those in the Public Service, or Police Constables.*

The nature of their position considerably aggravates

(x) s. 62.
(y) s. 63.
(z) s. 64.

Larceny by
public officers.

the offence of persons who are expected to take the lead in the prevention of crime. For any one employed in the public service of Her Majesty, or in the police, to steal any chattels, money, or valuable security, belonging to, or in possession or power of Her Majesty, or intrusted to, or received or taken into possession by him by virtue of his employment, is punishable by penal servitude to the extent of fourteen years (a).

(e.) *Robbery (b).*

Larceny from the person is either by privately stealing or by open and violent assault. The latter, usually termed "Robbery," will be treated of first, the former comprising all other cases of stealing from the person.

Definition of
robbery.

Robbery is the felonious and forcible taking from the person of another, or in his presence, against his will, of any money or goods to any value, by violence, or putting him to fear. The rules of larceny in general apply, and therefore the prosecution must prove the same points as in larceny, and certain others in addition.

The force or
bodily fear.

The gist of this crime is the *force* or *bodily fear*. It is not necessary to shew that both were present. Though no violence was used, it will suffice if it can be proved that the goods were delivered to the prisoner by the party robbed under the impression of a certain degree of *fear* and apprehension. What is that degree of fear? On the one hand, the fear is not confined to an apprehension of bodily injury, and, on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of

The fear.

(a) s. 69. As to the venue, v. s. 70. Larceny by agents, bankers, trustees, &c., will be noticed under the title "Embezzlement."

(b) As to piracy or robbery on the high seas, v. p. 42.

exercising it through the influence of the terror impressed (c). It is not necessary that the danger should be impending on the person of the party robbed; it may be on those dear to him, as his children, or on his house (d). There is no reason why the personal character of the person robbed should lighten the offence of the robber; therefore it is not necessary to prove that the fear actually existed, if it be shewn that the circumstances are such as are calculated to create a fear of the nature indicated. And if this be shewn, the resort to some pretence by the offender will not divest the act of the character of robbery; as if a person with a sword begs alms; by the same means compels some one to swear that he will return with money, the fear of the menaces still continuing to operate when the money is delivered.

Though there be no fear, yet if there is actual *force* The force or violence. or *violence*, it is a robbery; as where the prisoner knocks down the prosecutor from behind, and steals from him his property while he is insensible on the ground. But the rule appears to be well established that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it (e).

The force or fear must precede or accompany the taking, so that a subsequent scuffle or putting to fear in order to keep the property will not constitute a robbery. The force, &c., must not be subsequent to the taking.

To constitute a taking, the robber must actually obtain possession of the goods; so that it would not be Possession of the goods must be taken.

(c) *R. v. Donnelly*, 2 East, P. C. 713.

(d) *R. v. Astley*, 2 East, P. C. 729.

(e) Arch. 451; *R. v. Steward*, 2 East, P. C. 702.

robbery to cut a man's girdle in order to get his purse, the purse thereby falling to the ground, if the robber was compelled to run off before he could take it up.

The taking must be from the person, or in the presence, &c.

The taking must be *from the person*, or *in the presence* of the party robbed. Thus it is robbery to put a man in fear, and then in his presence to drive away his cattle. So also by threats to compel him to deliver up his property, though the robber never touch his person. In the case of simple larceny, there must be some severance of the property. In robbery there must be something more, namely, a complete removal from the person of the party robbed. Removal from the place where it is, if it remains throughout with the person, is not sufficient (*f*).

Against the will.

The taking must be *against the will* of the person robbed. Therefore when he, through a third party, procured others to commit the robbery in order that he might get the reward upon the conviction, it was held not to be robbery (*g*).

Punishment.

Robbery may be punished by penal servitude to the extent of fourteen years (*h*). If the robbery is accompanied by violence, either at the time of, or immediately before, or immediately after such robbery; or if the robbery, or assault with intent to rob, is by a person armed with any offensive weapon or instrument; or if the robbery or assault with intent to rob is by two or more persons, penal servitude to the extent of life may be awarded (*i*). By a later statute, in the case of a male, sentence of private whipping once, twice, or thrice may be added (*j*).

(*f*) *R. v. Thompson*, 1 Mood. C. C. 78; but see *R. v. Lapiet*, 1 Leach, 320.

(*g*) *R. v. Macdaniel*, Foxt. 121, 128. Cf. *R. v. Eggington*, p. 209; *R. v. Williams*, 1 C. & K. 195.

(*h*) s. 40.

(*i*) s. 43.

(*j*) 26 & 27 Vict. c. 44.

(f.) *Stealing from the Person.*

Under this head fall all other cases of stealing from the person, not attended by violence or putting to bodily fear. Of this nature is pocket-picking when the offence is committed privily. An actual taking must be proved, inasmuch as the nature of the case precludes there being anything like a constructive taking, such as the delivery, &c., in robbery. Stealing from the person.

The principles of robbery as to the severance, taking, intent, &c., generally apply. The punishment is the same as for simple robbery, namely, penal servitude to the extent of fourteen years (k).

(g.) *Assault with intent to rob.*

It seems convenient to notice this offence here, seeing that the evidence upon an indictment for such assault usually proves a robbery with the exception of a taking and carrying away, which for some reason are not effected. No actual violence need be done, but anything done in the presence of the party intended to be robbed, with reference to him, in furtherance of the intent to rob him, will constitute the assault (l). Nor need there be any demand of money. Assault with intent to rob.

The punishment for this felony (save and except where a greater punishment is provided by the Act) (m) is penal servitude to the extent of five years (n).

If on an indictment for robbery the jury are of opinion that the prisoner did not commit robbery, but did commit an assault with intent to rob, they may find him guilty of the latter offence, and he will be punished Verdict of assault on indictment for robbery.

(k) s. 40.

(l) Arch. 458.

(m) These cases are noticed above.

(n) s. 42.

accordingly (o). But on an indictment for assault with intent to rob, the defendant cannot be convicted of a common assault (p).

LARCENY, ETC., IN RELATION TO THE POST OFFICE.

Post office
offences.

The law on this subject is contained chiefly in the Post Office Act (q). Two classes of offences may be distinguished, according as the offenders are (a) Post office *employés*; (b) Persons generally, whether so employed or not.

(a.) For a *person employed under the Post Office*.

Offences by
post office
employés.

To steal, or for any purpose whatever embezzle, secrete, or destroy a post-letter, is a felony, punishable by penal servitude not exceeding seven years, or imprisonment not exceeding three years. If the letter contains any chattel, money, or valuable security, the punishment is penal servitude to the extent of life, or imprisonment not exceeding four years (r). If the thing stolen, embezzled, &c., is any printed matter; or if such printed matter is wilfully detained or delayed, the offence is a misdemeanor, punishable by fine or imprisonment, or both (s).

Contrary to his duty, to open or procure or suffer to be opened a post-letter, or to detain, delay, or procure to be detained, &c., a post-letter, is a misdemeanor, punishable by fine or imprisonment, or both (t).

(b.) For *any person*

Offences by
any person.

To steal from a post-letter any chattel, money, or valuable security; or to steal a post letter-bag, or a

(o) s. 41.

(p) *R. v. Woodhall*, 12 Cox. 240.

(q) 7 Wm. 4 & 1 Vict. c. 36.

(r) *Ibid.* s. 26.

(s) *Ibid.* s. 32.

(t) *Ibid.* s. 25.

post-letter from a post letter-bag, or from a post office or from any officer of the post office, or from a mail; or to stop a mail with intent to rob or search the same, is a felony, punishable with penal servitude to the extent of life, or imprisonment not exceeding four years (*u*).

To steal or unlawfully take away a post letter-bag sent by a post office packet; or to steal or unlawfully take a letter out of any such bag; or to unlawfully open any such bag, is a felony, punishable with penal servitude to the extent of fourteen years, or imprisonment not exceeding two years (*x*).

To fraudulently retain, or wilfully secrete, keep, or detain, or neglect or refuse to deliver up when required by an officer of the post office, a letter after it has been delivered by mistake or found, is a misdemeanor, punishable by fine and imprisonment (*y*).

To solicit or endeavour to procure any other person to commit a felony or misdemeanor, punishable by the Post Office Acts, is a misdemeanor, and is punishable by imprisonment not exceeding two years (*z*).

The property in the article stolen, whether it be bag, letter, or money, or other goods contained therein, is to be laid in the postmaster-general (*a*).

Property laid
in postmaster-
general.

In connection with this subject, it should be noticed that written or printed messages delivered at a post office for the purpose of being transmitted by a postal telegraph, and every transcript thereof officially made, are deemed post-letters within the above Act (*b*). For

(*u*) ss. 27, 28, 41.

(*x*) ss. 29, 41.

(*y*) s. 31.

(*z*) s. 36.

(*a*) s. 40. As to venue, see s. 37.

(*b*) 32 & 33 Vict. c. 73, s. 23.

Telegrams.

officials of the post office to disclose or intercept telegraphic messages is a misdemeanor, punishable by imprisonment not exceeding twelve months (c).

RECEIVING STOLEN GOODS.

Receiving stolen goods, when a felony, when a misdemeanor.

The offence of receiving stolen property, knowing it to have been stolen, was at common law a misdemeanor only. By the Larceny Act, 1861, it is made a felony if the principal crime (stealing, &c.) amounts to a felony at common law or by that Act. So that the only case in which receiving still continues a misdemeanor is where the principal crime is not a felony either at common law or by that Act; for example, receiving goods obtained by false pretences, or obtained by means of the felony established by 31 & 32 Vict. c. 116, s. 1 (d).

How a receiver may be tried for the felony, &c.

Receivers, where the principal crime amounts to a felony at common law or by the Larceny Act, may be tried in either one of two capacities:—

- (i.) As accessories after the fact (*i.e.*, of larceny, &c.).
- (ii.) As committers of a distinct or substantive felony—and in this case, whether the principal has or has not been previously convicted, or even if he is not amenable to the criminal law.

The statute (e) establishing this optional mode of proceeding, enumerates the offenders subject thereto as—those who receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof amounts to a felony either at common law or by virtue of that Act, knowing the same to have been feloniously stolen, taken, &c.

(c) 31 & 32 Vict. c. 110, s. 20.

(d) *R. v. Smith*, L. R. 1 C. C. R. 266; 39 L. J. (M.C.) 112.

(e) 24 & 25 Vict. c. 96, s. 91.

The larceny or other felonious taking must be proved. ^{The larceny, &c.} For this and every other purpose the principal felon is a competent witness; but of course the jury will form their own opinion as to the weight of his testimony; and if the thief is the only witness, the judge will advise an acquittal (*f*).

Next, it must be proved that the goods were received ^{The receiving.} by the prisoner into his actual possession; though a manual possession is not necessary (*g*). The goods being found in his possession is good presumptive evidence of his having received them.

The knowledge of the prisoner *at the time he received the goods* that they were stolen, is proved either directly, ^{The guilty knowledge.} by the evidence of the principal felon, or circumstantially, as by shewing that the prisoner bought them much under their value, denied that he had them in his possession, &c. Evidence may also be given that there was found in his possession other property stolen within the preceding twelve months. And again, if evidence has been given that the stolen property has been found in his possession, at any stage of the proceedings evidence may be given of a conviction within the five years immediately preceding of any offence involving fraud or dishonesty. But in this last case seven days' notice in writing must be given to the accused that proof is intended to be given of such previous conviction (*h*).

The allowing evidence of a previous conviction to be given during the course of a trial, so that it may affect the minds of the jury, is an exception to the usual policy and practice of our criminal law. As a rule, the only influence which a previous conviction is allowed ^{Evidence of previous conviction.}

(*f*) *R. v. Robinson*, 4 F. & F. 43.

(*g*) *R. v. Smith*, 24 L. J. (M.C.) 135.

(*h*) 34 & 35 Vict. c. 112, s. 19.

to exert is, after the verdict has been given, on the judge in determining the sentence.

Punishment
for the felony,

The punishment for the felonious receiving is penal servitude to the extent of fourteen years (*i*). But receiving a post-letter, a post letter-bag, or any chattel, or money, or valuable security, the stealing, or taking or embezzling, or secreting whereof amounts to a felony under the Post Office Acts, knowing the same to have been feloniously stolen, &c., and to have been sent or to have been intended to be sent by post, is punishable by penal servitude to the extent of life, or imprisonment not exceeding four years (*k*).

for the misde-
meanor,

Where the principal offence is a misdemeanor by the Larceny Act, *e.g.*, if the property has been obtained by false pretences, the receiver, knowing that the property has been unlawfully stolen, taken, obtained, converted or disposed of, is also guilty of a misdemeanor, punishable by penal servitude to the extent of seven years (*l*).

for the offence
punishable on
summary
conviction.

Where the principal offence is punishable on summary conviction, the receiver is liable, on summary conviction, to the same punishment to which the principal is liable for stealing or taking such property on the same conviction (*i.e.*, the first, second, or subsequent) (*m*).

Count for
receiving in
indictment for
stealing and
vice versa.

Contrary to the general rule, which does not admit of different felonies being charged in different counts of the indictment (*n*), in an indictment for stealing any property it is lawful to add a count or counts for feloniously receiving the same or any part or parts thereof. And conversely, in an indictment for receiving it is lawful to add a count for feloniously stealing the same.

(*i*) s. 91.

(*k*) 7 Wm. 4, and 1 Vict. c. 36, ss. 30, 41.

(*l*) s. 95.

(*m*) s. 97.

(*n*) v. p. 343.

It is for the jury to say of which offence they find the prisoner guilty; or if there are more prisoners than one, it is for the jury to say which are guilty of each offence (*o*).

Any number of receivers, though they received at different times, of the property which has been stolen or otherwise disposed of in such manner as to amount to a felony at common law or by the Larceny Act, may be charged with substantive felonies (*i.e.*, of receiving) in the same indictment, and tried together (*p*). And, in any case, upon the trial of two or more indicted for jointly receiving, the jury may convict one or more of separately receiving (*q*).

Trial of several receivers.

With a view to the prevention of crimes of this and similar descriptions, it has been provided that any one who keeps a lodging, public, beer, or other house or place where intoxicating liquors are sold, or any place of public entertainment or public resort, or a brothel, and knowingly lodges or harbours thieves or reputed thieves, or allows the deposit of goods therein, having reasonable cause for believing them to be stolen, is liable to a penalty not exceeding £10, or, in default of payment, imprisonment not exceeding four months; or instead, or in addition to such punishment, the court may require him to enter into recognizances for keeping the peace or being of good behaviour. There are also provisions for the forfeiture of licences on such conduct (*r*). Power is given under certain circumstances to search for stolen property, even without a search warrant (*s*).

Penalties on those keeping public places who harbour thieves, admit stolen goods, &c.

If a pawnbroker is convicted of receiving stolen

Pawnbroker receiving.

(*o*) s. 92.

(*p*) s. 93.

(*q*) s. 94.

(*r*) 34 & 35 Vict. c. 112, ss. 10, 11.

(*s*) *Ibid.* s. 16.

goods knowing them to be stolen (or of any fraud in his business), the court may direct that his licence shall cease to have effect (*t*).

Recent possession.

We frequently hear of the so-called doctrine of *Recent Possession*, that is, of the possession of property within a short time after it has been stolen. Why a matter of mere common sense should be elevated to the style of a "doctrine," it is not easy to see. What is meant is only that, according to the circumstances of the case, the recent possession is evidence that the person in possession stole the property, or received it knowing it to have been stolen. This evidence may be of the strongest, or of hardly any weight at all. It will vary not only according to the length of time, but also according to other considerations, one of the chief of which is the nature of the property, whether it be of a description which can easily pass from one person to another. Thus the possession of a diamond ring a year after the theft would be more indicative of a felonious intent than the possession of a pound of cheese after the lapse of a week (*u*).

(*t*) 35 & 36 Vict. c. 93, s. 38.

(*u*) *R. v. Partridge*, 7 Q. & P. 551; *R. v. Langmead*, L. & C. 427; *R. v. Deer*, 32 L. J. (M.C.) 33.

CHAPTER II.

EMBEZZLEMENT.

EMBEZZLEMENT may be defined as the unlawful appropriation to his own use by a servant or clerk of money or chattels received by him for and on account of his master or employer. It differs from larceny by clerks or servants in this respect: embezzlement is committed in respect of property which is not at the time in the actual or legal possession of the owner, whilst in larceny it is. An example will illustrate the distinction. A clerk receives £20 from a person in payment for some goods sold by his master; he at once puts it into his pocket, appropriating it to his own use; this is embezzlement. The clerk appropriates to his own use £20 which he takes from the till; this is larceny. The line of demarcation between the two offences appears sometimes to be very finely drawn (x). This would be liable to work injustice, were it not for a provision to which we shall shortly have to refer (y).

Embezzlement
defined and
distinguished
from larceny.

The principal points to be noticed are the following:—

- (i.) Proof that the prisoner was employed as clerk or servant.
- (ii.) Proof of his receipt for, or in the name of, or on account of, the employer or master.
- (iii.) Proof of the unlawful appropriation.

(x) It is urged that there is no ground for preserving the distinction. This would especially be the case if the principle of possession of the servant being the possession of the master had been interpreted with the same latitude in criminal and civil cases.—ROSC. 463.

(y) v. p. 236.

(i). *Proof of the Employment as Clerk or Servant.*

Employment
as clerk or
servant.

It is for the jury to determine whether the prisoner is a clerk or servant within the meaning of the statute, the court explaining what is necessary to constitute such a relation.

The clerks or servants need not be in the employment of those in trade. The particular name by which they are called, as accountant, collector, overseer, &c., is not material if the general relationship can be proved (z). It is a very difficult matter to determine whether the required relationship exists. The various tests which have been suggested all appear in turn to have been overruled. The employment need not be continuous, for it was held to be embezzlement though the prisoner was employed to receive in a single instance only (a). The mode of remuneration for service is not decisive, that is, whether by commission or by salary. This will not distinguish an agent from a servant (b). Nor will a participation in the profits of the sale prevent the character of servant from arising (c). The question is not decided by the consideration whether the whole or only a part of a man's time is devoted to the other's business (d), nor whether he is bound to obey the latter's directions (e). A person who is employed as servant by several is considered the individual servant of each (f).

Embezzlement
by public
officers.

Embezzlement by persons employed in the public service, or by police constables, of any chattel, money,

(z) *v. R. v. Squire*, R. & R. 349.

(a) *R. v. Hughes*, 1 Mood. C. C. 370.

(b) *R. v. Bailey*, 12 Cox, 56.

(c) *R. v. Atkinson*, 2 Mood. C. C. 278.

(d) *R. v. Tite*, 30 L. J. (M.C.) 142.

(e) *v. R. v. Spencer*, R. & R. 299.

(f) 3 Stark, N. P. 70. The reader is referred to the cases given by Archbold, Roscoe, &c., for a fuller examination of this difficult point, whether the relationship required by the statute exists; v. especially *R. v. Negus*, L. R. 2 C. C. R. 34; 42 L. J. (M.C.) 62.

or valuable security, which is intrusted to, or received, or taken into possession by virtue of their employment, is subjected to generally the same consequences as if the embezzlement were from an ordinary master (*g*).

(ii.) *The Receipt for, &c., the Master.*

The mere fact of receipt is usually proved by the person who gave the money, &c., to the prisoner, or by his own admission. That he received it for, in the name of, or on account of his master, the jury may infer from the circumstances of the case. But it will not be embezzlement if the prisoner received the money from his master in order to pay to a third person (*h*). Nor if the money is already constructively in the possession of the master by the hands of any other clerk or servant (*i*). It is immaterial that the money was not really due to the master. The receipt need not now be by virtue of his employment in order to constitute embezzlement; and therefore it may be embezzlement, though the servant had no authority to receive. But it is necessary that the money, &c., should be the property of the master when received by the servant, and therefore money appropriated by a servant in consideration of work which the prisoner did by the unauthorized use of his master's tools, the payer contracting with the servant only, does not constitute embezzlement (*k*).

What will constitute a receipt for, &c., the master.

(iii.) *The unlawful Appropriation.*

The usual evidence given of the appropriation is, that having received the money, &c., the prisoner denied the receipt, or accounted for other moneys received at the same time, or after, and not for it, or

The appropriation.

(*g*) 24 & 25 Vict. c. 96, s. 70. Larceny by the above, v. p. 221.

(*h*) *R. v. Smith*, R. & R. 267.

(*i*) *R. v. Wright*, 27 L. J. (M.C.) 65.

(*k*) *R. v. Cullum*, L. R. 2 C. C. R. 28; 42 L. J. (M.C.) 64.

rendered a false account, or practised some other deceit in order to prevent detection (*l*).

The mere non-payment to the master of money which the prisoner has charged himself in his master's book with receiving is not embezzlement (*m*). But, on the other hand, it is no defence to merely shew that he entered the receipt correctly in the master's book (*n*). If, instead of denying the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offence in taking and keeping is no embezzlement (*o*). But where it is the prisoner's duty, at stated times, to account for and pay over to his employer the money received during those intervals, his wilfully omitting to do so is embezzlement, and equivalent to a denial of the receipt of them (*p*).

Specific sum
to be proved.

It appears that now some specific sum must be proved to have been embezzled. It will not suffice to prove a general deficiency in the prisoner's accounts (*q*).

Three acts of
embezzlement
may be
charged.

There may be charged in the same indictment, and the defendant may be tried at the same time for, any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against Her Majesty, or against the same master or employer, within six months from the first to the last of such acts (*r*). As we have already seen, a person indicted for embezzlement may be found guilty of, and punished for, larceny, and *vice versa* (*s*).

(*l*) Arch. Q. S. 540.

(*m*) *R. v. Hodgson*, 3 C. & P. 422.

(*n*) *R. v. Lister*, 26 L. J. (M.C.) 26.

(*o*) *R. v. Norman*, C. & Mar. 501.

(*p*) *R. v. Jackson*, 1 C. & K. 384.

(*q*) *R. v. Lloyd Jones*, 8 C. & P. 288; *R. v. Wolstenholme*, 11 Cox, 313; see *Rosc.* 457.

(*r*) 24 & 25 Vict. c. 96, s. 71.

(*s*) *Ibid.* s. 72, v. p. 218.

The punishment for embezzlement is penal servitude ^{Punishment} to the extent of fourteen years (*t*).

The summary jurisdiction given by the Summary ^{Summary} Jurisdiction Act, 1879 (*u*), to the justices in petty ^{jurisdiction.} session is the same in cases of embezzlement as in larceny.

Falsification of Accounts.

An offence of a kindred nature may be noticed ^{Falsification} here. For a clerk, officer, servant, or other *employé* ^{of accounts.} to wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any of his employer's books, papers, accounts, &c., or make false entries therein, is punishable by penal servitude to the extent of seven years (*x*).

Embezzlement by Bankers, Merchants, Brokers, Attorneys, Agents, or Factors.

If any such person is intrusted with any money or ^{Embezzlement} security, with a direction in writing to apply the same ^{by bankers} for any specified purpose, or to any specified person, ^{and others} and he, in violation of good faith, and contrary to the ^{intrusted with} terms of such direction, converts the same to his own ^{property for a} use, or the use of any person other than the one by ^{special pur-} whom he is so intrusted; or (*b*) if, having been ^{pose.} intrusted as one of the above with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any stock or fund, for safe custody or for any special purpose, without authority to sell, negotiate, transfer, or pledge, he, in violation of good faith and contrary to the object or purpose specified, sells, negotiates, transfers, pledges, or in any manner converts to his own use, or that of some other person than the one by whom he is intrusted, such chattel or security or the proceeds thereof,

(*t*) 24 & 25 Vict. c. 96, s. 68.

(*u*) 42 & 43 Vict. c. 49.

(*x*) 38 & 39 Vict. c. 24.

or the share or interest to which the power of attorney relates, he is guilty of a misdemeanor, and is liable to penal servitude to the extent of seven years (*y*). There is a saving in this section exempting from such liability trustees and mortgagees; also bankers, &c., in receiving money due on securities, or disposing of securities on which they have a lien.

Bankers, &c.
dealing with
property
intrusted to
them.

It is a misdemeanor, attended with the same punishment, for a banker, merchant, broker, attorney, or agent, with intent to defraud, to sell, negotiate, &c., any property with which he is intrusted for safe custody (*z*). So also for any person intrusted with a power of attorney for the sale or transfer of any property, to fraudulently sell, transfer, or otherwise convert it to his own use, or that of any person other than the one by whom he is intrusted (*a*).

Factors or
agents charg-
ing property
intrusted to
them.

Factors or agents intrusted, for the purpose of sale or otherwise, with the possession of any goods or of any document of title to goods, who, without the authority of the principal, for their own use or that of any person other than the one by whom they are so intrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any such goods or document, by way of pledge, lien, or security for any money or valuable security, borrowed by them (the factors, &c.); or (*b*), without authority, &c., accept any advance of any money or valuable security on the faith of any contract or agreement to consign, &c., such goods or document, are guilty of a misdemeanor, and punished as above. So also are clerks or others knowingly and wilfully assisting in carrying out the aforesaid measures. A saving clause is added that the factor or agent will not be liable for consigning, &c.,

Saving clause.

(*y*) 24 & 25 Vict. c. 96, s. 75. An attorney intrusted with moneys "for investment" does not come within the meaning of this section. *R. v. Newman*, 8 Q. B. D. 706; 46 L. T. N. S. 394.

(*z*) *Ibid.* s. 76.

(*a*) *Ibid.* s. 77.

if the property is not made a security for or subject to the payment of any greater sum of money than the amount which, at the time of the consignment, was due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by the factor or agent (b).

Embezzlement by Trustees.

For a trustee (or his representative, s. 1) of property for the use of some other person, or for any public or charitable purpose, with intent to defraud, to convert, or appropriate the same to his own use, or that of any other person than the person aforesaid, or for any purpose other than such public or charitable purpose; or (b), to otherwise dispose of or destroy the property, is a misdemeanor, punishable by penal servitude to the extent of seven years. But no criminal proceedings may be taken without the sanction of the Attorney-General. And, if civil proceedings have been taken against the trustee, the person who has taken such proceedings may not commence any prosecution under this section without the sanction of the court or judge of such civil proceedings (c).

Embezzlement
by trustees.

Embezzlement by Directors, Officers, and Members of Public Companies and Corporate Bodies.

The following offences are misdemeanors punishable by penal servitude to the extent of seven years:—

Offences by
directors, &c.

For a director, member, or public officer of a body corporate or public company, to fraudulently take or apply to his own use, or any use or purpose other than the uses or purposes of such body or company, any of the property of the body or company (d).

Appropriating
the common
property.

(b) 24 & 25 Vict. c. 96, s. 78.

(c) Ibid. s. 80.

(d) Ibid. s. 81.

Receiving
without enter-
ing in the
books.

For a director, public officer, or manager of such body or company, to receive or possess himself of any of the property of the company, &c., otherwise than in payment of a just debt or demand, and, with intent to defraud, to omit to make or have made a full and true entry thereof in the books and accounts of the company (e).

Fraudulent
falsification of
the books.

For a director, manager, public officer, or member, with intent to defraud, to destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security, belonging to the body or company; or (b) to make or concur in making any false entry, or to omit or concur in omitting any material particular in any book of account or other document (f).

Making false
statements,
&c.

For a director, manager, or public officer to make, circulate, or publish, or concur in making, &c., any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body or company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body or company, or to enter into any security for the benefit thereof (g).

No prosecu-
tion if there
has been a
disclosure in
a civil action.

With regard to these cases of embezzlement by bankers, merchants, attorneys, agents, or factors, trustees, directors, officers, or members of bodies corporate or public companies, the provisions as to which are contained in sects. 75 to 84 of the Larceny Act, it is enacted that no person shall be convicted of any of these misdemeanors if he shall, at any time previously to his being charged with such misdemeanor, have dis-

(e) 24 & 25 Vict. c. 96.

(f) Ibid. s. 83.

(g) Ibid. s. 84.

closed the act on oath, in consequence of any action which shall have been *bond fide* instituted by any party aggrieved; or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency (*h*).

For a director, officer, or contributory of a company wound up under the Companies Act, 1862, to destroy, mutilate, alter, or falsify any books, papers, writings, or securities, or to make or be privy to making any false or fraudulent entry in any book or other document of the company, with intent to defraud or deceive any person, is a misdemeanor, punishable by imprisonment not exceeding two years (*i*).

Falsification
in case of
company
wound up.

For an officer of a savings bank to receive any deposit and not pay over the same is a misdemeanor, punishable by fine or imprisonment, or both (*k*).

Savings banks.

(*h*) 24 & 25 Vict. c. 96, s. 85. And also nothing in these sections shall entitle any person to refuse to answer a question in a civil proceeding on the ground that it tends to criminate himself.—s. 85. The criminal proceeding is not to deprive any party of his civil remedy, but the conviction is not to be evidence in such civil suit.—s. 86.

(*i*) 25 & 26 Vict. c. 89, s. 166.

(*k*) 26 & 27 Vict. c. 87, s. 9. False statements, returns, &c., by railway companies, v. 29 & 30 Vict. c. 108, ss. 15-17; 31 & 32 Vict. c. 119, s. 5; 34 & 35 Vict. c. 78, s. 10.

CHAPTER III.

FALSE PRETENCES.

False pre-
tences distin-
guished from
larceny.

It is difficult to correctly define the offence of obtaining property by false pretences. In some cases, on the one hand, there seems little to distinguish it from larceny; and in others, to distinguish it from a mere non-criminal lie. The most intelligible distinction between false pretences and larceny has been thus set forth (*l*): "In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." The line between the two crimes is very narrow. Thus, A. intrusts B. with a parcel to carry to C. D. meets B. and alleges that he is C., whereupon B. gives him the parcel. It will be larceny if B. had not authority to pass the property; false pretences if he had (*m*). The difficulty of discriminating arises chiefly where there has been a constructive taking only, where the owner delivers the property, though the possession is obtained by fraud. The evil which might arise from this state of things is to some extent obviated by a provision that if upon an indictment for false pretences it is proved that the defendant obtained the property in such manner as to amount in law to larceny, he is not on that account to be acquitted (*n*). Therefore in cases of doubt it is better to indict for false pretences.

(*l*) Aroh. 374; v. *White v. Garden*, 10 C. B. 927.

(*m*) v. *R. v. Watkins*, 1 Leach, 520.

(*n*) 24 & 25 Vict. c. 96, s. 88.

The points to be proved on an indictment for false pretences are the following:—

- i. The pretence and its falsity.
- ii. That the property or some part thereof was obtained by means of the pretence.
- iii. The intent to defraud.

i. The pretence must be wholly or in part of an *existing fact* (*o*); for example, a false statement of one's name and circumstances in a begging letter. But a mere exaggeration will not suffice, as if a person actually in business pretends that he is doing a very good business (*p*); otherwise, if he were not doing any business at all (*q*). The fact must be an *existing fact*; therefore it is not within the act for a person to pretend that he will do something which he does not mean to do (*r*). But a promise to do a thing may involve a false pretence that the promisor has the power to do that thing; and for this an indictment will lie (*s*).

Pretence must be of an existing fact.

Obtaining additional money by stating that a larger amount of goods is delivered than is known to be the case, is within the statute (*t*). But of course not every breach of warranty or false assertion at the time of a bargain will be treated as a false pretence (*u*); for example, if, in selling an article for a lump sum, the vendor makes a false representation as to the weight in order to induce the purchaser to conclude

(*o*) "It may be laid down as a general rule of interpretation of the statute, that wherever a person fraudulently represents as an *existing fact* that which is not an existing fact, and so gets money, &c., that is an offence within the Act."—Arch. 515.

(*p*) *R. v. Williamson*, 11 Cox, 328.

(*q*) *R. v. Crabb*, 11 Cox, 85.

(*r*) *R. v. Lee*, 9 Cox, 304. See also *R. v. Speed*, 46 L. T. N. S. 174.

(*s*) *R. v. Giles*, 34 L. J. (M.C.) 50.

(*t*) *R. v. Ragg*, 29 L. J. (M.C.) 86.

(*u*) *R. v. Codrington*, 1 C. & P. 661.

the bargain (*x*). However, it seems clear that a false representation respecting an alleged matter of definite fact knowingly made is a false pretence within the statute; even although the representation is merely as to the quality of the goods sold; as when the prosecutor was induced to purchase a chain on the representation that it was fifteen carat gold, whereas it was only six carat (*y*). But if the representation is only what is matter of opinion, and amounts merely to exaggerated praise, the party is not criminally liable; as where the defendant said his spoons were equal to Elkington's (*z*).

The pretence,
how expressed.

The false pretence need not be expressed in words; it will suffice if the pretence is signified in the conduct and acts of the party; for example, by obtaining goods upon giving in payment a cheque upon a banker with whom the defendant has no account, he believing that it would not be paid on presentation (*a*); or by a person, who was not a member of the university, obtaining goods fraudulently at Oxford through wearing a commoner's cap and gown (*b*). A false pretence made through an innocent agent is, of course, the same as if made by the defendant himself.

Indictment
for forgery.

If the goods are obtained by means of a forged order, note, or other document, the party should be indicted for forgery, seeing that the punishment for that offence is much more severe. But the prisoner will not be acquitted for the false pretence on the ground that he might have been indicted for forgery (*c*).

(*x*) *R. v. Ridgway*, 3 F. & F. 838.

(*y*) *R. v. Astley*, L. R. 1 C. C. R. 301; 40 L. J. (M.C.) 85.

(*z*) *R. v. Bryan*, 26 L. J. (M.C.) 84.

(*a*) *R. v. Jackson*, 3 Camp. 370; *v. R. v. Hazleton*, L. R. 2 C. C. R. 134; 44 L. J. (M.C.) 11.

(*b*) *R. v. Barnard*, 7 C. & P. 784.

(*c*) 14 & 15 Vict. c. 100, s. 12.

It will suffice if the falsity of the substance of the pretence is proved, although every particular is not established (*d*).

ii. *The intent to defraud.*

As in other cases, the intent is generally to be gathered from the facts of the case. It is sufficient to allege in the indictment, and to prove at the trial, an intent to defraud generally, without alleging or proving an intent to defraud any particular person (*e*). The intent to defraud.

It has been held that to support the evidence of intent to defraud proof that the defendant has *subsequently* obtained other property from some other person by the same pretence is not admissible (*f*); but that evidence of similar false pretence on a *prior* occasion is admissible (*g*). Evidence of other pretences.

Obtaining property by false pretences is a misdemeanor, punishable by penal servitude to the extent of five years (*h*). It is subject to the provisions of the Vexatious Indictments Act (*i*). As we have seen, the defendant is not entitled to be acquitted for the misdemeanor because the facts shew that the offence amounts to larceny; but no person tried for such misdemeanor is liable to be afterwards prosecuted for larceny upon the same facts (*k*). Punishment.

Winning at play by fraud is punishable as for obtaining money by false pretences (*l*).

Closely allied to the offence of false pretences is that

(*d*) *R. v. Hill*, R. & R. 190.

(*e*) 24 & 25 Vict. c. 96, s. 88.

(*f*) *R. v. Holt*, 30 L. J. (M.C.) 11.

(*g*) *R. v. Francis*, L. R. 2 C. C. R. 128; 43 L. J. (M.C.) 97.

(*h*) 24 & 25 Vict. c. 96, s. 88.

(*i*) v. p. 359.

(*k*) 24 & 25 Vict. c. 96, s. 88; v. *R. v. Bulmer*, 33 L. J. (M.C.) 171.

(*l*) 8 & 9 Vict. c. 109, s. 17. See also *R. v. O'Connor*, 45 L. T. N. S. 512.

Inducing execution of valuable securities by fraud. *of inducing persons by fraud to execute valuable securities.* For any person, with intent to defraud or injure another, by any false pretence to fraudulently cause or induce any person to execute, make, accept, indorse, or destroy the whole or any part of any *valuable security*; or (b) to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made, or converted into, or used, or dealt with as a valuable security, is a misdemeanor, punishable as obtaining by false pretences (*m*).

FALSE PERSONATION.

False personation. The obtaining goods, money, or other advantage by false personation is a crime similar to false pretences. At common law false personation is punishable as a cheat or fraud; but certain particular cases are dealt with by statute. This crime is also closely connected with forgery; and many statutes providing against forgery at the same time provide against false personation.

of seamen, *Of seamen, soldiers, &c.*—For a person, in order to receive any pay, wages, prize money, &c., payable, or supposed to be payable, or any effects or money in charge, or supposed to be in charge, of the Admiralty, falsely and deceitfully to personate any person entitled, or supposed to be entitled, to receive the same, is a misdemeanor, punishable by penal servitude to the extent of five years; or, on summary conviction, by imprisonment not exceeding six months (*n*).

of soldiers, To knowingly and wilfully personate or falsely assume the name or character of, or to procure others

(*m*) 24 & 25 Vict. c. 96, s. 90.

(*n*) 28 & 29 Vict. c. 124, s. 8; v. s. 9.

to personate, &c., a soldier or other person who shall have really served, or be supposed to have served, in Her Majesty's army or in any other military service, or his representatives, in order to receive his wages, prize money, &c., due or payable, or supposed to be due or payable, for service performed, or supposed to be performed, is a felony, punishable by penal servitude to the extent of life (o). It is no defence to an indictment under section 49 that the person was authorized to personate the soldier; or that he had bought from him the prize money to which the latter was entitled (p).

Owners of Stock, &c.—To falsely and deceitfully ^{of owners of stock,} personate the owner of any share or interest in any stock, annuity, or public fund, which is transferable at the Bank of England or Bank of Ireland; or (b) the owner of any share or interest in any capital stock of any body corporate, company, or society established by charter or Act of Parliament; or (c) the owner of any dividend or money payable in respect of any such share or interest, and thereby to transfer, or endeavour to transfer, any such share or interest, or receive, or endeavour to receive, any money so due, as if the offender were the true and lawful owner, is a felony, punishable by penal servitude to the extent of life (q).

To obtain property in general.—By the False Personation Act, 1874, it is provided that, for any person ^{of owners of property of any kind.} to falsely and deceitfully personate any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, chattel, money, valuable security, or property, is a felony, punishable by penal servitude to the extent of life (r).

(o) 2 & 3 Wm. 4, c. 53, s. 49; 7 Geo. 4, c. 16, s. 38.

(p) *R. v. Lake*, 11 Cox, 333.

(q) 24 & 25 Vict. c. 98, s. 3; v. also National Debt Act, 1870 (33 & 34 Vict. c. 58, s. 4); India Stock (26 & 27 Vict. c. 73, s. 14); Companies Act, 1867 (30 & 31 Vict. c. 131, s. 35).

(r) 37 & 38 Vict. c. 36, s. 1; v. also s. 2.

Personating
bail.

Bail.—Without lawful authority or excuse (which it lies on the accused to prove), in the name of another person to acknowledge any recognizance or bail, or any *cognovit actionem*, or judgment, or any deed or other instrument, before any court, judge, or other person lawfully authorized in that behalf, is a felony, punishable by penal servitude to the extent of seven years (s).

CHEATING.

What cheats
are indictable.

Cheating is a comprehensive term, including in its wider signification False Pretences, False Personation, and other crimes which are specially provided for. A cheat at common law is the fraudulent obtaining the property of another by any deceitful and illegal practice or token which *affects or may affect the public* (t). Thus, the leading characteristic of such a cheat is the publicity of its effects. Therefore, a cheat or fraud effected by an unfair dealing and imposition on an individual is not the subject of an indictment at common law. Of course many acts of cheating are not punishable at all by the criminal law; the person wronged being left to its remedy by civil action.

Cheats at
common law.

The chief classes of offences regarded as cheats at common law are the following :—

Against public justice, *e.g.*, counterfeiting a discharge.

Against public health, *e.g.*, selling unwholesome provisions.

Against public economy, *e.g.*, by using false weights or measures.

(s) 24 & 25 Vict. c. 98, s. 34. Voters at elections, parliamentary and municipal, 35 & 36 Vict. cc. 33, 60; 5 & 6 Wm. 4, c. 76; 6 & 7 Vict. c. 18.

(t) v. 2 Russ. 520.

There must be a plausible contrivance, as in the last instance, against which common prudence could not have guarded. Thus, though selling by false weights or measures is a misdemeanor, selling under weight is merely actionable.

Apart from the common law crime, a great multitude of statutes are designed to restrain and punish particular deceits, or deceits in particular trades. ^{Deceits punished by statute.} Amongst the more general we may notice the laws preventing cheating by:—

Counterfeit trade-marks (u).

Fraudulent conveyances (x).

The general punishment for this misdemeanor is fine or imprisonment, or both. ^{Punishment.}

(u) v. p. 125.

(x) 13 Eliz. c. 5; 27 Eliz. c. 4. Under 41 & 42 Vict. c. 49, s. 26, any person wilfully committing, or being party to, a fraud in the using of any weight, measure, scale, balance, steelyard, or weighing machine, is liable to a fine of £5. For other common law cheats, v. 2 Russ. 604, *et seq.*

CHAPTER IV.

BURGLARY, ETC.

Burglary,
definition at
common law,

THE offence of Burglary (in the strict signification of the term) is thus defined at common law: The breaking and entering of the dwelling or mansion-house of another in the night time with intent to commit a felony (*y*). The limits of burglary proper have been extended; and the punishment of other crimes closely connected with burglary has been also separately provided for by statute. The crime is thus described in the Larceny Act: "Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary" (*z*).

by the Larceny
Act.

Four points present themselves for consideration: the time, place, manner, and intent.

The time.

i. *Time*.—Formerly great uncertainty existed as to what constituted *night*—whether it was the interval between sunset and sunrise, whether it included twilight, &c. The matter has been settled by statute. As far as regards burglary and other offences treated

(*y*) 3 Inst. 63.

(*z*) 24 & 25 Vict. c. 96, s. 51. "This is an excellent instance of the way in which, by the combined operation of common and statute law, definitions are made, as it were, to stand on their heads. The common law being a very rude system, involving great severity of punishment, affixed special names to complications of crimes. The statute law took up the complicated definition as the starting point, and inserted minor offences to fill up the gap left by the common law."—Fitz. St. 139.

of in the Larceny Act the night is deemed to commence at nine o'clock in the evening, and to conclude at six o'clock on the following morning (a).

Both the breaking and the entering must take place at night. If either be in the daytime, it is not burglary. But the breaking may take place on one night and the entering on another, provided that the breaking is with intent to enter, and the entering is with intent to commit a felony (b).

ii. *Place*.—It must be the dwelling-house of another. The place. To constitute a *dwelling-house* for the purposes of the statute dealing with burglary and similar offences (the Larceny Act), the house must be either the place where one is in the habit of residing, or some building between which and the dwelling-house there is a communication, either immediate or by means of a covered and inclosed passage leading from the one to the other; the two buildings being occupied in the same right (c). It must be the house of *another*; therefore a person cannot be indicted for a burglary in his own house, though he breaks and enters the room of his lodger and steals his goods.

The decisions as to what places satisfy the requirements of burglary have been numerous, and, to some extent, conflicting. We may gather the following facts:—

The building must be of a permanent character; The nature of the building. therefore a tent or booth will not suffice, although the owner lodge there. The tenement need not be a distinct building; thus chambers in a college or inn of court will suffice.

As to the nature of the *residence* which is necessary.—

(a) 24 & 25 Vict. c. 96, s. 1.

(b) *R. v. Smith*, R. & R. 417.

(c) *R. v. Jenkins*, R. & R. 224; 24 & 25 Vict. c. 96, s. 53.

What amounts to residence. The temporary absence of the tenant is not material if he has an intention of returning, though no one be in during the interval. It will suffice if any of the family reside in the house, even a servant (*d*), unless the servant is there merely for the purpose of protecting the premises (*e*). It seems that sleeping is necessary to constitute residence (*f*).

Where part of the house is let. In the case of hiring a part of a house, the part let off may be considered as the dwelling-house of the hirer if the owner does not himself dwell in the house, or if he and the hirer enter by different doors; that is, of course, provided that the hirer satisfies the other requirements of residence given above. If he does not, the place cannot be the subject of burglary at all; it is not the dwelling-house of the lodger or tenant, because there is no residence; nor of the owner, because it is severed by the letting (*g*). But if the owner himself, or any of his family, lie in the house, and there is only one outward door at which they and the lodger enter, the lodger is regarded as an inmate; and therefore the house must be described as that of the owner (*h*).

At common law a church might be the subject of burglary; but this case is now specially provided for by statute (*i*).

The manner. iii. *Manner*.—There must be both a breaking and an entering.

The breaking. As to the *breaking*.—It must be of part of the house; therefore it will not suffice if only a gate admitting

(*d*) *R. v. Westwood*, R. & R. 495.

(*e*) *R. v. Flannagan*, R. & R. 187.

(*f*) *R. v. Martin*, R. & R. 108.

(*g*) *v. Arch.* 542, 543, and cases quoted there.

(*h*) *v. R. v. Rogers*, 1 Leach, 89.

(*i*) *v. p.* 256.

into the yard is broken. But the breaking is not restricted to the breaking of the outer wall, or doors, or windows; if the thief gains admission by the outer door or window being open, and afterwards breaks or unlocks an inner door for the purpose of plundering one of the rooms, it is burglary (*k*). This will apply especially to the case of servants, lodgers, &c., who are lawfully in the house. Breaking chests or cupboards does not satisfy the requirements of burglary.

The breaking is either actual or constructive. *Actual*, <sup>Actual break-
ing.</sup> when the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of a house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting the latch, or unlooses any other fastening to doors or windows which the owner has provided (*l*). It is not burglary if the entry is made through an open window or door, or through an aperture (other than a chimney), provided that the thief does not break any inner door. Nor is raising a window which is already partly open; but it has been decided that lifting the flap of a cellar which was kept down by its own weight was burglary (*m*).

The breaking is *constructive*, where admission is <sup>Constructive
breaking.</sup> gained by some device, there being no actual breaking. As, for example, to knock at the door and then rush in under pretence of taking lodgings, and fall on and rob the landlord; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house. These are breaches sufficient to constitute burglary, for the law will not suffer itself to be trifled with by such evasions (*n*). So

(*k*) *R. v. Johnson*, 2 East, P. C. 488.

(*l*) 3 Inst. 64; 1 Hale, P. C. 552.

(*m*) *R. v. Russell*, 1 Mood, C. C. 377.

(*n*) 4 Bl. 226.

for servants to conspire with a robber, and let him into the house at night, is a burglary in both. To obtain admission to a house by coming down the chimney is sufficient, for the chimney is as much closed as the nature of things will admit; but getting through a hole in the roof left to admit light is not (o).

Entry. As to the *entry*.—The least degree of entry with any part of the body, or with any instrument held in the hand, will suffice; for example, stepping over the threshold, putting a finger or hook in at the open window in order to abstract goods.

Breaking out. Though formerly there were doubts on the subject, it is now provided by statute that it is burglary for a person who has entered the dwelling-house of another with intent to commit a felony therein, or for a person who in such dwelling-house (*e.g.*, a servant) has committed a felony therein, to *break out* (p).

Attempt. When the breaking with intent to commit a felony is proved, but there is no proof of entry, the jury may convict the prisoner of an attempt to commit burglary (q).

The intent to commit a felony. iv. The *Intent*.—To constitute a burglary, there must be an intent to commit some felony in the dwelling-house, otherwise the breaking and entry will only amount to a trespass (r). It must be either proved from evidence of the actual commission of the felony, or implied from some overt act if the felony is not actually carried out. For it is none the less burglary because the felony which is intended is not perpetrated.

(o) *R. v. Brice*, R. & R. 450.

(p) 24 & 25 Vict. c. 96, s. 51.

(q) *R. v. Spanner*, 12 Cox, 155.

(r) 1 Hale, P. C. 561.

Burglary is a felony, punishable by penal servitude Punishment to the extent of life (s).

Two or three crimes connected with the subject of burglary remain to be considered:—

Entering a dwelling-house in the night, with intent to Entering dwelling-house at night with intent, &c. commit a felony—the offence differing from burglary inasmuch as there is no breaking—is a felony punishable by penal servitude to the extent of seven years (t).

Being found by night armed with any dangerous or Armed at night with intent, &c. offensive weapon or instrument, with intent to break or enter into any dwelling-house, or *other building* whatsoever, and to commit a felony therein; (*N.B.* An intent either to break or to enter will suffice, also that the offence is not confined to *dwelling-houses*. Proof must be given of an intent to break into or enter a particular building; proof of a general intent will not suffice) (u);

or, being found by night in possession, without law- Possession of housebreaking implement by night. ful excuse, of any *housebreaking implement*, or being found with the face blackened or otherwise disfigured, with intent to commit a felony;

or, being found by night in any dwelling-house or Being in dwelling-house, &c. other building, with intent to commit a felony therein,

is a misdemeanor, punishable by penal servitude to the extent of five years (x). If any of the above misdemeanors be committed after a previous conviction for felony or after a previous conviction for one of such misdemeanors, the penal servitude is from five to ten years (y).

(s) 24 & 25 Vict. c. 96, s. 52.

(t) Ibid. s. 54.

(u) *R. v. Jarrald*, 32 L. J. (M.C.) 258.

(x) 24 & 25 Vict. c. 96, s. 58.

(y) Ibid. s. 59; 27 & 28 Vict. c. 47, s. 2; 42 & 43 Vict. c. 55, s. 1.

HOUSEBREAKING.

Housebreak-
ing distin-
guished from
burglary.

The chief distinction between this crime and burglary is that the former may be committed by *day*, the latter by *night* only. There is also a difference to be noticed as to the structure which may be the subject of the crimes. Housebreaking extends to school-houses, shops, warehouses, and counting-houses, as well as dwelling-houses, also any building within the *curtilage* of a dwelling-house and occupied therewith, but not being part thereof according to the provision of section 53, noticed above (z).

Nature of the
crime.

This crime consists in the breaking and entering any such house with the intention of committing a crime therein, or in the case of one being in such house, committing a felony therein, and breaking out of the same. The breaking and entering will be proved as in burglary.

Punishment.

The punishment for this felony varies according to whether the projected felony, the object of the breaking, is actually committed, or there is only an intention; in the former case the extent of the penal servitude being fourteen years, in the latter seven years (a). On an indictment for the former, the prisoner may be convicted of the latter. Also, if the indictment charges the breaking and stealing, if the prosecution fail to prove the breaking, the prisoner may be convicted of larceny in a dwelling-house (b), or of simple larceny.

Sacrilege.

Breaking, &c.,
church,
chapel, &c.

Breaking and entering a church, chapel, meeting-house, or other place of divine worship, and committing a felony therein, or, if already therein, committing a

(z) 24 & 25 Vict. c. 96, s. 55; v. p. 251.

(a) Ibid. ss. 56, 57.

(b) v. p. 257.

felony and breaking out, is a felony, punishable by penal servitude to the extent of life (c). If the projected felony is not actually committed, but the intent to commit is proved, the limit of the penal servitude is seven years (d).

The proof is generally the same as that in house-breaking. It seems that the articles stolen need not be such as are used for divine service (e).

Larceny in a dwelling-house.

This crime differs from housebreaking inasmuch as there need not be any breaking, nor any entry with a view to the commission of the larceny. As in burglary, the building must be proved to be a dwelling-house, or some building occupied therewith or communicating in the manner before described (f).

Stealing in such dwelling-house any chattel, money, or valuable security to the value in the whole of £5 or more, is a felony, punishable by penal servitude to the extent of fourteen years (g). And although the value does not amount to £5, the punishment is the same if the thief by any menace or threat puts any one in the dwelling-house in bodily fear (h).

The goods must be under the protection of the house, and not in the personal care of the owner. Thus to steal a sum of money from a person's pocket while he is in the house, is not within the statute, unless, indeed, the clothes containing such pocket had been put off, in which case they would be under the

(c) 24 & 25 Vict. c. 96, s. 50.

(d) Ibid. s. 57.

(e) Arch. 433; *R. v. Rourke*, R. & R. 386.

(f) v. p. 251.

(g) 24 & 25 Vict. c. 96, s. 60.

(h) Ibid. s. 61.

protection of the house (i). It was decided in the same case that it is a question for the court, and not for the jury, whether the goods are under the protection of the house or in the personal care of the owner (k). It appears now to be settled that the fact that the larceny was committed in the thief's own house does not take the case out of the statute (l).

RECAPITULATION.

Inasmuch as there is great danger of confusion and considerable intricacy in the definitions, it will be well to recapitulate the distinctions between certain crimes partaking of the general character of fraud. A few general remarks on the class as a whole will be added.

Larceny and
embezzlement.

First, as to *Larceny* and *Embezzlement*. The gist of the latter offence is that, in the case of appropriation by a servant or clerk of money or chattels received by him for his master or employer, such money or chattels are not at the time of appropriation in the actual or constructive possession of the master or employer; or, in other words, the prisoner intercepts the property on its way to the possession of the master or employer. In more than one direction does this crime very closely border on larceny. Thus difficult points may arise on the questions—whether the appropriator were a servant; whether the master were in possession of the property, &c.

Larceny and
false pre-
tences.

Between *Larceny* and *False Pretences* the main distinction is, that in the former the *property* is not passed by the owner to the thief (and generally the possession is not intended to be passed); while in the

(i) *R. v. Thomas*, Car. Sup. 295.

(k) This seems to be another invasion of the province of the jury.

(l) *R. v. Bowden*, 1 C. & K. 147.

latter the property is passed to the defendant, but this is brought about by fraud. Here, again, subtle questions arise as to the authority to pass the property, &c.

The distinction of *Robbery* from other kinds of larceny *Robbery*. is, that in the former case there must have been a felonious taking from the *person*, or in the *presence* of another accompanied either by *violence* or a *putting to fear*.

In *Burglary* there is a limitation in certain respects *Burglary*. not necessary in simple larceny: as to the *time*, viz., at night; as to the *place*, viz., a dwelling-house; as to the *manner*, viz., the breaking and entering, or breaking out. In one point burglary is wider in its scope—there need not be an actual larceny; it will suffice if there is an intent to commit a felony.

Between *Burglary* and *Housebreaking* the distinction *Burglary and house-breaking*. is that the former must be committed at night, and is more limited with respect to the buildings which are its subjects.

Between *Housebreaking* and *Larceny in a dwelling-house* there is the distinction as to the breaking, and also as to the building, as to which the latter crime is *Housebreaking and larceny in a dwelling-house*. on the same footing as burglary.

Sir James Stephen (*m*) proposes a comprehensive *Proposed definition of theft*. definition of theft, to include not only all that usually now goes by the name of Larceny, but also Embezzlement, Obtaining by False Pretences, and other "illegal and malicious transfers of any of the advantages, derived from property, from the person entitled to them to some other person," thereby abolishing "five or six useless and intricate distinctions between cognate crimes," and doing away with "all the technicalities

about the kinds of property which are the subjects of larceny, and with those which arise out of the obscure doctrine of possession.

The definition. The definition is—"To steal is unlawfully, and with intent to defraud, by taking, by embezzlement, by obtaining by false pretences, or in any other manner whatever, to appropriate to the use of any person any property whatever, real or personal, in possession or in action, so as to deprive any other person of the advantage of any beneficial interest at law, or in equity, which he may have therein."

Its innovations.

This definition "would include a great variety of fraudulent breaches of trust, many of which are now unpunished, or are punished, if at all, by special enactments, the construction of which is doubtful." The chief points in which it differs from the existing law are two: (a) "It takes, as the test of criminality, an intention to defraud at the time of appropriation of the property, and not at the time of its asportation." It is obvious that the moment of appropriation is the really critical time. (b) "It views, as the subject-matter of larceny, the beneficial interest of the proprietor, and not his specific right of possessing a specific thing." Thus the temporary use of an article would be as much the subject of larceny, if obtained with the intent to defraud, as the absolute permanent deprivation.

CHAPTER V.

FORGERY.

FORGERY may be described, in general terms, as the false making (or alteration) of an instrument (or part thereof) which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud (*n*). Forgery described.

The statute law on this subject is chiefly contained in one of the Consolidated Acts of 1861—The Forgery and False Personation Act (*o*). These laws are not careful to bring themselves within the compass of any definition; and they frequently deal with offences which do not strictly fall under the principal heading. Thus, in the Forgery Act, we shall find noticed many offences which, “though not amounting to forgery, facilitate, or are steps towards the commission of that crime, or are of a somewhat similar nature.”

It may be premised that forgery is very closely allied to obtaining by false pretences (*p*). Indeed, “if there were no special provisions on the subject, many cases of forgery would be punishable as cases of obtaining goods or money by false pretences” (*q*). It is needless to say that forgery is treated as a much more serious crime than false pretences. Forgery and false pretences.

We shall, in the first place, notice with what instru-

(*n*) v. 2 East, P. C. 991; 4 Bl. 247.

(*o*) 24 & 25 Vict. c. 98. When merely a section is quoted in this chapter it must be understood to be a section of this statute.

(*p*) v. p. 244.

(*q*) Fitz. St. 141.

ments the statute deals, and what are left to the punishment at common law; and then examine the nature of the crimes which may be committed with regard to these instruments.

Needless
verbosity of
the Forgery
Act.

The statute is a model of excessive and needless intricacy. It consists of fifty-six sections, of which about half are merely enumerations of particular classes of instruments which it is felony to forge. Inasmuch as in almost every case the punishment is the same, "the greater part of the law is perfectly needless, and might be condensed into one section as follows: 'Whosoever maliciously, and for the purpose of fraud or deceit, shall forge anything written, printed, or otherwise made capable of being read, or utter any such forged thing, knowing the same to be forged, shall, upon conviction, be sentenced to penal servitude for life, or for any term not less than three (*r*) years, or to imprisonment, with or without hard labour, for any term not exceeding two years'" (*s*).

Instruments
dealt with in
the Forgery
Act enumerated.

But as we are concerned with the law as it is, not as it might be, it will be our task to enumerate the classes of instruments, the *forging*, or *altering*, or the *offering*, *uttering*, *disposing of* or *putting off* (knowing the same to be forged or altered) of which is a felony. In each case, unless otherwise specified, the punishment is that indicated above, viz., penal servitude from five years to life, or imprisonment not exceeding two years.

The Great Seal of the United Kingdom; the Queen's Privy Seal; her Royal Sign Manual, &c.; and documents to which any of these are attached (sect. 1).

Transfer of stock, power of attorney, &c. (sect. 2.)

(*r*) Now five.

(*s*) Fitz. St. 142.

Attestation to a power of attorney, &c. Maximum of penal servitude, seven years (sect. 4).

False entry or alteration in the books of the public funds (sect. 5).

False dividend-warrant by *employés* of Bank of England or Bank of Ireland. Maximum, seven years (sect. 6).

East India bonds (*t*) (sect. 7).

Exchequer bills, bonds, or debentures (*u*) (sect. 8).

Bank notes, bills, &c., or indorser's assignment thereof (sect. 12).

Deeds, bonds, assignments of bonds, or names of attesting witnesses (sect. 20).

Wills, codicils, &c. (sect. 21).

Bills of exchange, or any acceptance, indorsement, or assignment thereof; promissory notes, or any indorsement or assignment thereof (*x*) (sect. 22).

Undertakings, warrants, orders, receipts, &c., for payment of money, delivery or transfer of goods, &c. (sect. 23).

Obliterating or altering crossings on cheques (sect. 25).

Debentures. Maximum, fourteen years (sect. 26).

Proceedings of courts of record or equity, &c. Maximum, seven years (sect. 27).

False copies or certificates of record by an officer of

(*t*) For statutes dealing with forgery of other East India Securities, v. Arch. 655.

(*u*) See also 29 & 30 Vict. c. 25, s. 15. Also metropolitan bills by 41 & 42 Vict. c. 37, s. 20.

(*x*) v. s. 24 as to making, accepting, &c., any bill, note, &c., by procuration or otherwise, for any other person, without authority; or uttering the same knowing it to have been so made, &c. The punishment is penal servitude to the extent of fourteen years.

the court; so also for any other person to use such false process. Maximum, seven years (sect. 28).

Instruments made evidence by statute. Maximum, seven years (sect. 29).

Court roll, or copy thereof, relating to copyhold estates (sect. 30).

Certificates and other writings relating to the registry of deeds. Maximum, fourteen years (sect. 31).

Summons, conviction, order or warrant of magistrates. Maximum, five years (sect. 32).

Name of Accountant-General of Chancery (y). Maximum, fourteen years (sect. 33).

Licence or certificate of marriage. Maximum, seven years (sect. 35).

Register of births, baptism, deaths, marriages, burials (z), &c. (sect. 36).

Making false entries in copies of registers sent to registrars (sect. 37).

Forgeries
dealt with in
other statutes.

In addition to the above-mentioned instruments, &c., the forgery of which is dealt with in the Forgery Consolidation Act, there are other cases provided for by many statutes too numerous to notice. One or two of the more important are the following:—

Stock certificates or coupons, &c., issued by the Bank of England for the payment of interest of national debt (33 & 34 Vict. c. 58, s. 3, v. also sect. 6).

Inland Revenue stamps (33 & 34 Vict. c. 98, s. 18).

Election documents (35 & 36 Vict. c. 33, s. 3).

(y) Now Paymaster-General, 35 & 36 Vict. c. 42, s. 12.

(z) Destroying, injuring the above, and other offences connected with the same subject are also dealt with in this section.

Trade-marks (25 & 26 Vict. c. 88; 38 & 39 Vict. c. 91) (a).

Falsification of accounts by clerks, officers, servants, and other *employés* (38 & 39 Vict. c. 24) (b).

Under Land Transfer and Declaration of Title Acts (25 & 26 Vict. c. 67; 38 & 39 Vict. c. 87) (c).

Printing a copy of any Act, proclamation, order, regulation, royal warrant, circular, list, gazette, or document which falsely purports to have been printed under the superintendence of Her Majesty's Stationery Office, or tendering in evidence any such falsely printed copy, is also forgery (d).

So much for forgeries provided against by particular statutes. Forgery at common law is a misdemeanor, punishable by fine or imprisonment, or both. It is only in virtue of the particular statute that any forgery is made a felony; the facility with which certain forgeries can be perpetrated, and the dangerousness of their tendency, necessitating this course. Cases of forgery which have not been specially dealt with by statute are nevertheless crimes, and left to their punishment at common law; for example, forging a testimonial to character in order to obtain an appointment (e).

In viewing the crime generally, we shall have to treat of two classes of acts, each entailing the same consequences, and both usually appearing in different counts of the same indictment.

i. The actual forgery.

ii. The knowingly uttering the forged instrument.

(a) v. p. 125.

(b) v. p. 237.

(c) v. p. 271.

(d) 45 Vict. c. 9. s. 3.

(e) *R. v. Sharman*, 23 L. J. (M.C.) 51.

The instru-
ment.

i. The *Forgery*.—As to the *instrument* itself. It must have some apparent validity, that is, it must purport on the face of it to be good and valid for the purpose for which it is created. So that a bill of exchange, which, for want of signature, is incomplete, cannot be the subject of forgery, because the defect is on the face of the instrument (*f*). But in such a case the prisoner may be convicted of a forgery at common law (*g*). But there need not be an exact resemblance; it will be sufficient if it is capable of deceiving persons of ordinary observation (*h*). The forgery must be of some document or writing; therefore the painting an artist's name in the corner of a picture, in order to pass it off as an original picture by that artist, is not forgery (*i*).

Nature of the
fabrication.

As to what *fabrication* will constitute a forgery.—It need not be of the whole instrument. Very frequently the only false statement is the use of a name to which the defendant is not entitled. It does not matter whether the name wrongly applied be a real or a fictitious one (*j*). And a person may be guilty of forgery by making a false deed in *his own* name, as when a person has made a conveyance in fee of land to A., and afterwards makes a lease for 999 years of the same land to B. of a date prior to that of the conveyance to A., for the purpose of defrauding A., the latter deed is a forgery (*k*). Even to make a mark in the name of another person, with intent to defraud that person, is forgery (*l*). Of course the forgery need not be in the name; it may equally be in some other part of the instrument. For example, it is forgery

(*f*) *R. v. Pateman*, R. & R. 455. See also *R. v. Harper*, 7 Q. B. D. 78; 50 L. J. (M.C.) 90.

(*g*) Per Stephen, J., in *R. v. Harper*, *supra*.

(*h*) *R. v. Collicott*, R. & R. 212.

(*i*) *R. v. Closs*, 27 L. J. (M.C.) 54.

(*j*) *R. v. Lockett*, 1 Leach, 94.

(*k*) *R. v. Ritson*, L. R. 1 C. C. R. 200; 39 L. J. (M.C.) 10.

(*l*) *R. v. Dunn* 1 Leach, 57.

to fill in without authority a form of cheque already signed, with blanks left for the insertion of the sum (*m*).

Not only a fabrication, but even an *alteration*, however slight, if material, will constitute a forgery; for example, making a lease of the manor of *Dale* appear to be a lease of the manor of *Sal*e by changing the D to S (*n*); making a bill of exchange for £8 appear to be for £80 by adding a cipher (*o*).

An alteration will suffice.

It must be proved that the alleged forgery was intended to represent the handwriting of the person whose handwriting it appears to be and is proved not to be, or that of a person who never existed. How is it to be proved that it is not the handwriting of the person of whom it purports to be? The most natural evidence is the denial of such person on his being produced as a witness. Even before the change in the law, which made interested parties competent witnesses, it was allowable to call as a witness the party whose writing had been forged (*p*). Whether he be or be not called as a witness, the handwriting may be proved not to be his by any person acquainted with his handwriting, either from having seen him write, or from being in the habit of corresponding with him (*q*). It is also provided by statute that comparison of a disputed writing with *any* writing proved to the satisfaction of the judge to be genuine, may be made by witnesses; and that such writings and the evidence of witnesses concerning the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute (*r*). It appears

Evidence as to the writing.

(*m*) *Flower v. Shaw*, 2 C. & K. 703.
 (*n*) 1 Hawk. c. 70, s. 2.
 (*o*) *R. v. Elsworth*, 2 East, P. C. 986.
 (*p*) 9 Geo. 4, c. 32.
 (*q*) v. p. 439.
 (*r*) 28 Vict. c. 18, s. 8.

not to be settled whether an expert may give evidence as to whether the writing is in a feigned hand from its appearance (*s*). It is sufficient to disprove the handwriting of the person, and he need not be called to disprove an authority to others to use his name; circumstances shewing guilty knowledge are enough (*t*).

The intent to defraud.

As to the *intent* to defraud.—It is not necessary to prove an intent to defraud any particular person; it will suffice to prove generally an intent to defraud (*u*). So it need not appear that the prisoner had any intention ultimately to defraud the person whose signature he had forged, he having defrauded the person to whom he uttered the instrument (*v*). But it is not necessary that any person should be actually defrauded, or that any person should be in a situation to be defrauded by the Act (*x*).

The uttering.

ii. The *Uttering*.—In an indictment for forgery it is usual to add a second count, charging the prisoner with knowingly uttering the forged instrument. So that if the prosecution fail to prove the actual forgery, the prisoner may be convicted of the uttering.

Under the Forgery Act a tender will suffice.

The words of the Consolidation Act, which deals with all instruments in ordinary use, are, “offer, utter, dispose of, and put off.” Therefore, in cases falling within that statute, it will suffice if there be a tender, or attempt to pass off the instrument; there need not be an acceptance by the other. Where such acceptance is requisite in order to constitute the crime, there

(*s*) See cases in Arch. 614; Rosc. 180.

(*t*) *R. v. Hurley*, 2 M. & Rob. 473.

(*u*) S. 44.

(*v*) *R. v. Trenfield*, 1 F. & F. 43.

(*x*) *R. v. Nash*, 21 L. J. (M.C.) 147.

must be other words describing the offence, such as "pay, and put off" (y).

It is an uttering if the forged instrument is used in any way so as to get money or credit by it, or by means of it, though it is produced to the other party, not for his acceptance, but for some other purpose; for example, for inspection, as where the prisoner placed a forged receipt for poor-rates in the hands of the prosecution, for the purpose of inspection only, in order, by representing himself as a person who had paid his poor-rates, fraudulently to induce the other to advance money to a third person (z). It is immaterial that the uttering was only conditional. Object of the uttering.

Of course the forged character of the instrument, and the intent to defraud, must be proved, as on the first count for the forgery. It will be also necessary to prove that the defendant *knew* the instrument to be forged. This point is not capable of direct proof, but will be presumed from the facts of the case; for example, on its appearing that the prisoner had in his possession other forged notes of the same kind. To prove the *scienter* or guilty knowledge, evidence may be given that the defendant has passed other forged notes, &c.; and it has been decided that evidence may be given of a subsequent uttering, even though that subsequent uttering be made the subject of a distinct indictment (a). Guilty knowledge of the utterer.

As we have already observed, the Forgery Consolidation Act deals with other offences of a kindred nature. Of these the following are the chief:—

Relating to Exchequer Bills, Bonds, Debentures, &c. (b)

(y) v. Arch. 618.

(z) *R. v. Ion*, 21 L. J. (M.C.) 166.

(a) *R. v. Aston*, 2 Russ. 732.

(b) Extended to Metropolitan bills by 41 & 42 Vict. c. 37, s. 20.

**Exchequer bills, &c.
Making plates, &c.** —Making, or knowingly having, without lawful authority or excuse, plates, or other implements in imitation of those peculiarly used for manufacturing such bills, &c., is a felony, punishable by penal servitude to the extent of seven years (*c*).

Making paper, &c. Making or having paper in imitation of that used for such bills, &c., or taking any impression from any plate, &c., mentioned in the last section, is a felony, punishable in the same way (*d*).

Purchasing, &c., paper, or plates. Purchasing, receiving, or having in possession, paper or plates made by authority for the purpose of such bills, &c., is a misdemeanor, punishable by imprisonment not exceeding three years (*e*).

Bank notes. *Relating to Bank Notes.*—The following acts done without lawful authority or excuse, relating to bank notes, are felonies, punishable by penal servitude to the extent of fourteen years:—

Purchasing, &c., forged bank notes. Purchasing, receiving, or having in possession, forged bank notes or bank bills, knowing the same to be forged (*f*).

Making paper. Making or having moulds for making paper with the words "Bank of England" or "Bank of Ireland" visible on the surface, or with curved or waving bar lines, &c., or making, selling, &c., such paper (*g*).

Engraving. Engraving on a plate, &c., any bank note, &c.; or using or having in possession any such plate; or utter-

(*c*) s. 9.

(*d*) s. 10.

(*e*) s. 12; v. 29 & 30 Vict. c. 25, ss. 20, 21. What is criminal possession for the purposes of the Consolidation Act is defined in s. 45.

(*f*) s. 13.

(*g*) s. 14.

ing, or having paper upon which a blank bank note, &c., is printed (*h*).

Engraving on a plate, &c., any word or device resembling any part of a bank note, &c.; or using or having such plate, &c.; or uttering or having paper on which there is an impression of any such words, &c. (*i*).

Making or having moulds for making paper with the name of any bankers appearing on the substance; making, selling, having, &c., such paper (*k*). Making moulds.

Engraving plates, &c., for foreign bills or notes; using or having such plates; or uttering paper on which any part of such bill, &c., may be printed (*l*). Foreign notes, &c.

There is another offence dealt with by the Forgery Act. With intent to defraud, to demand, obtain, or have delivered to any person, or to endeavour so to do, any property by virtue of a forged instrument, knowing the same to be forged, is a felony, punishable by penal servitude to the extent of fourteen years (*m*). Obtaining property by means of forged instrument.

False personation, the other main topic of the Forgery and False Personation Act, has already been treated of (*n*).

FRAUDS AGAINST LAND TRANSFER, ETC., ACTS.

Certain frauds against the Land Transfer Act 1875 (*o*), are punishable, as misdemeanors, by imprisonment; Frauds against Land Transfer Act;

(*h*) s. 16.

(*i*) s. 17.

(*k*) s. 18.

(*l*) s. 19. As to instruments for forging inland revenue stamps, 33 & 34 Vict. c. 98, s. 18; local stamps, 32 & 33 Vict. c. 49, s. 8.

(*m*) s. 38.

(*n*) v. p. 246.

(*o*) 38 & 39 Vict. c. 87.

ment not exceeding two years, or fine not exceeding £500 :—

Suppressing or attempting to suppress, or being privy thereto, any document or fact, with intent to conceal the title or claim of any person, or to substantiate a false claim, in proceedings under the Act (*p*).

Procuring, attempting, or being privy to the procurement of any entry on the register, or any alteration or erasure therein (*q*).

False declarations under the Act (*r*).

against Decla-
ration of Title
Act.

Offences against the Declaration of Title Act, 1862 (*s*), are the following :—

Making, &c., material false statements, or representations, or suppressing, &c., material documents, facts, or matters of information, is a misdemeanor, punishable by penal servitude not exceeding three years, or such fine as may be thought fit (*t*).

Forging or altering certificates or other documents relating to land or title under this Act, or uttering such forged matter, knowing the same to be forged, is a felony, punishable by penal servitude to the extent of life (*u*).

A person may not refuse in a civil proceeding under this Act to give evidence on the ground that the answer will tend to criminate him; but such evidence may not be used against him in a criminal proceeding (*x*).

(*p*) 38 & 39 Vict. c. 87, s. 99.

(*q*) Ibid. s. 100.

(*r*) Ibid. s. 101.

(*s*) 25 & 26 Vict. c. 67.

(*t*) Ibid. s. 44.

(*u*) Ibid. s. 45.

(*x*) Ibid. s. 47.

CHAPTER VI.

INJURIES TO PROPERTY.

ONE of the Criminal Consolidation Acts, 1861 (y), deals with Arson and Malicious Injuries to Property (z). Of these offences the present chapter will treat.

ARSON.

Arson is the malicious and wilful setting fire to any ^{Arson.} building. The term does not strictly comprise cases of setting fire to other things, such as corn, ships, &c. ; but it will be convenient to treat here of them also.

The statute in different sections deals with setting ^{Buildings} fire to :— _{enumerated.}

Churches, chapels, and other places of divine worship (s. 1).

Dwelling-house, any person being therein (s. 2).

House, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed, or farm, or any farm building, or any building or erection used in farming land, or in carrying on any trade or manufacture, with intent thereby to injure or defraud any person (s. 3).

Station, warehouse, or other building belonging to any railway, port, dock, or harbour, or any canal or other navigation (s. 4).

(y) 24 & 25 Vict. c. 97.

(z) When merely a section is quoted in this chapter it must be understood to refer to that statute.

Public building, as described in the Act (s. 5).

All these cases of arson are felonious, punishable by penal servitude to the extent of life. Arson in the case of any other building is punishable by penal servitude to the extent of fourteen years (a).

Besides these enactments with regard to setting fire to buildings, there are others dealing with the burning of other kinds of property.

Setting fire to anything in, &c., a building.

Setting fire to any matter or thing, being in, against, or under any building, under such circumstances that, if the building were thereby set fire to, the offence would amount to felony, is a felony, punishable by penal servitude to the extent of fourteen years (b). So, also, is attempting by any overt act to set fire to a building, or to any matter or thing mentioned in the last section, under such circumstances that, if the same were set fire to, the offender would be guilty of felony (c).

Crops.

Corn, &c.—Setting fire to any *crop* of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, is a felony, punishable by penal servitude to the extent of fourteen years (d).

Stacks.

Setting fire to any *stack* of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, is a felony, punishable by penal servitude to the extent of life (e).

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- (a) s. 6.
 - (b) s. 7.
 - (c) s. 8.
 - (d) s. 16.
 - (e) s. 17.

Attempting, by any overt act, to set fire to anything mentioned in the last two sections under such circumstances that, if the same were set fire to, the offender would be guilty of felony under either of those sections, is a felony, punishable by penal servitude to the extent of seven years (*f*). Attempt to set fire to crops or stacks.

Mines.—Setting fire to any mine of cannel coal, anthracite, or other mineral fuel, is a felony, punishable by penal servitude to the extent of life (*g*). Attempting to do the same under such circumstances, &c. (*v*. above) is a felony, punishable by penal servitude to the extent of fourteen years (*h*). Mines.

It would be advantageous to have a definition of arson which would comprise all the afore-mentioned cases of setting fire to property (*i*).

We may notice here certain provisions as to destroying *ships*, seeing that the most usual mode is by burning them :— Ships, setting fire to, &c.

Setting fire to, casting away, or in anywise destroying, any ship or vessel, whether the same be complete or in an unfinished state, is a felony, punishable by penal servitude to the extent of life (*k*).

The next section proceeds to subject to the same punishment the commission of any of the acts mentioned in sect. 42, specifying certain intents: "with intent thereby to prejudice any owner or part owner of

(*f*) s. 18.

(*g*) s. 26.

(*h*) s. 27.

(*i*) Sir James Stephen proposes the following :—"Arson is the malicious and unlawful setting fire to any real property (this would include all buildings, mines, and growing crops), or to any vegetable produce, stacked or otherwise stored for use; or to any personal property so connected with, or adjacent to, any real property, that, by setting fire thereto, such real property would be endangered."—Crim. Law, 144.

(*k*) s. 42.

such ship or vessel, or of any goods on board the same, or any person that has underwritten, or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same." It is difficult to see the object of this section. The general provision of the preceding section renders it unnecessary in any case to allege or prove the particular intent, seeing that no additional punishment is awarded if the particular intent is charged. This does not seem unlike first forbidding the stealing of a horse, and then of a brown horse.

Attempt to set fire to, &c., ships.

An attempt by any overt act to commit any deed mentioned in these two sections, under such circumstances that it would be a felony if actually committed, is a felony, punishable by penal servitude to the extent of fourteen years (*l*).

Cases of setting fire still punishable with death.

It appears to still remain a felony, punishable with death, to set fire to any of Her Majesty's *ships of war* (*m*); or works, or vessels in the docks of the port of London (*n*); but sentence may be recorded instead of being given openly.

In viewing the crime generally we may notice

- i. The character, moral and physical, of the setting fire ;
- ii. The intent to defraud or injure (when that is an essential of the crime).

The setting fire, the intention.

- i. The act must be done *unlawfully and maliciously*.—Therefore no mere negligence or mischance will amount thereto. But it is not necessary that the offence should be committed from malice (*o*) conceived

(*l*) s. 44.

(*m*) 12 Geo. 3, c. 24, s. 1.

(*n*) 39 Geo. 3, c. 69, s. 1. See also Naval Discipline Act, 29 & 30 Vict. c. 109, s. 34.

(*o*) Here again the signification of malice as a motive, equivalent to ill-

against the owner of the property (*p*). For example, if the accused, intending to set fire to the house of A., accidentally sets fire to the house of B., it is equally arson. Nor is it necessary that he should have had any intention of setting fire to any one's house; he will be guilty of arson, if, intending to commit some felony of an entirely different nature, he accidentally sets fire to another's house (*q*). So, also, will he be guilty, if, by wilfully setting fire to his own house, he burns that of his neighbour. If the act is proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved (*r*).

As to the "setting fire" from a *physical* point of view, there must be an actual burning of some part, ^{The physical effects.} however trifling, of the house, &c. To support an indictment for setting fire to a house, it will not suffice merely to prove that something in the house was burnt (*s*).

ii. *The intent to injure or defraud*.—When it is necessary to allege this, there is no need to allege an ^{The intent to injure or defraud.} intent to injure or defraud any particular person (*t*).

When a person wilfully sets fire to the house of another, the intent to injure that person is inferred from the act. But if the setting fire is the result of accident, though the accused be engaged in the commission of some other felony, there can be no intent to defraud.

It is specially declared in the Arson and Malicious

will, seems to have been present to the minds of the legislators. On the other hand, "maliciously" is to be taken in the technical sense of "with criminal intention."

(*p*) s. 58. This section applies to all offences coming within the Arson and Malicious Injuries Act.

(*q*) v. p. 16.

(*r*) *Bromage v. Prosser*, 4 B. & C. 247.

(*s*) *R. v. Russell*, C. & Mar. 541.

(*t*) s. 60. This section also applies to the Act generally.

Injuries Act that its provisions apply to every person who, with intent to injure or defraud any other person, does any of the acts made penal, although the offender be in possession of the property in respect of which such act is done (u).

MALICIOUS INJURY.

Malicious
injury

Having noticed one of the most dangerous forms of malicious injury—arson, it remains to consider others, which are dealt with in the same Act (x). It will be remembered that here “malicious” is to be taken in its technical signification. To bring them within the pale of the criminal law, all the acts which we shall notice must be done maliciously and wilfully.

It will be well to classify the different kinds of malicious injury, and then to consider certain points which are common to them all.

to houses, by
explosive
substance;

Houses, &c.—To destroy or damage a dwelling-house by the explosion of gunpowder or other explosive substance, whereby the life of some person is endangered, is a felony, punishable by penal servitude to the extent of life (y). The endangering of life must result from the damage done to the building particularized in the indictment (z). To place or throw gunpowder, &c., in, into, upon, under, against, or near any building, with intent to destroy the same, any machinery or goods, is a felony, punishable by penal servitude to the extent of fourteen years (a).

With regard to explosive substances, there has been a recent statute passed by which any person unlawfully and maliciously causing, by any explosive substance,

(u) s. 59.

(x) 24 & 25 Vict. c. 97.

(y) s. 9.

(z) *R. v. M'Grath*, 14 Cox, 598.

(a) 24 & 25 Vict. c. 97, s. 10.

any explosion likely to endanger life or cause serious injury to property, is guilty of felony, and liable to penal servitude for life, or imprisonment for a term not exceeding two years (b). Punishment is also provided by this Act for attempting to cause any such explosion, and for making or having in one's possession any explosive substance under suspicious circumstances (c).

To riotously and with force demolish, or begin to demolish, buildings, machinery, mine bridges, ways, &c., is a felony, punishable by penal servitude to the extent of life (d). If the offender does not proceed further than to injure or damage the above, he is guilty of a misdemeanor, punishable by penal servitude to the extent of seven years (e). If indicted under the former section, the defendant may be found guilty of the offence set out in the latter.

For a tenant holding a dwelling-house or other building for any term of years or other less term, or at will, or after the termination of any tenancy, to demolish or begin to demolish the building of which he is tenant, or to sever any fixture, is a misdemeanor, punishable by fine or imprisonment, or both (f).

Manufactures and Machinery (g).—To break, destroy, or damage with intent to destroy, certain goods, viz., silk, woollen, linen, cotton, hair, mohair, or alpaca, in process of manufacture, or the machinery employed in the manufacture; or (b) by force to enter any place in order to commit such offence, is felony, punishable by penal servitude to the extent of life (h). In the case of machines used in agricultural operations, or in any

(b) 46 Vict. c. 3, s. 2.

(c) Ibid. ss. 3 and 4.

(d) 24 & 25 Vict. c. 97, s. 10.

(e) s. 12.

(f) s. 13.

(g) See also ss. 11 and 12.

(h) s. 14.

manufacture other than those mentioned above, the extent of the penal servitude is seven years (*i*).

to mines ;

Mines (j).—To cause water to be conveyed into a mine with intent to destroy or damage the mine, or hinder the working ; or (b) with like intent to obstruct an air-way, water-way, shafts, &c., is a felony, punishable by penal servitude to the extent of seven years (*k*).

Subject to the same punishment is the offence of destroying, damaging with intent to destroy, or obstruct the engines, erections, ways, ropes, &c., used in mines (*l*).

to vessels ;

Vessels (m).—To throw in, against, or near a ship or vessel, any gunpowder or other explosive substance, with intent to destroy the vessel, machinery, working tools, goods, or chattels, although the explosion does not take place and no injury is effected, is a felony, punishable by penal servitude to the extent of fourteen years (*n*). To damage, otherwise than by fire, gunpowder, or other explosive substance, any vessel, complete or unfinished, with intent to destroy the same, or render it useless, is a felony, punishable by penal servitude to the extent of seven years (*o*).

endangering
vessels ;

To make, alter, or remove any light or signal, or to exhibit any false sign or signal, with intent to bring a vessel into danger ; or (b) to do anything tending to its immediate loss or destruction, is a felony, punishable by penal servitude to the extent of life (*p*). In

(i) s. 15.

(j) See also ss. 11 and 12.

(k) s. 28.

(l) s. 29.

(m) See also ss. 42-44, pp. 275, 276.

(n) s. 45.

(o) s. 46.

(p) s. 47.

case of cutting away or otherwise interfering with any buoy, &c., used or intended for the guidance of seamen or the purpose of navigation, the extent of the penal servitude is seven years (*q*).

To destroy any part of a vessel in distress, wrecked, ^{to wrecks;} stranded, or cast on shore, or any article belonging to such ship, is a felony, punishable by penal servitude to the extent of fourteen years (*r*).

Sea and River Banks, &c.—To break down, or other- ^{to banks, &c. ;} wise damage, banks, dams, walls, &c., so that land or buildings are, or are in danger of being, overflowed ; or (b) to destroy any quay, wharf, jetty, lock, sluice, towing path, drain, or other work belonging to any port, harbour, dock, reservoir, navigable river, or canal, is a felony, punishable by penal servitude to the extent of life (*s*). To remove, &c., piles, &c., used for securing such banks, &c. ; or (b) to open flood-gates or sluices, or do any other injury to a navigable river or canal, with intent and effect to interfere with the navigation, is a felony, the extent of the penal servitude for which is seven years (*t*).

Bridges, Viaducts, and Aqueducts.—To destroy any ^{to bridges,} bridge, viaduct, or aqueduct, over or under which any ^{viaducts, and} highway, railway, or canal passes ; or (b) to do anything so as to render either the bridge, &c., or the railway, &c., dangerous or impassable, is a felony, punishable by penal servitude to the extent of life (*u*).

Turnpikes.—To destroy the gates, toll-bars, chains, ^{to turnpikes ;} or houses thereof, is a misdemeanor, punishable by fine or imprisonment, or both (*v*).

(*q*) s. 48.

(*r*) s. 49.

(*s*) s. 30.

(*t*) s. 31.

(*u*) s. 33.

(*v*) s. 34.

to walls, gates, &c. ; It may be noticed here, that to destroy any fences, walls, stiles, or gates, is punishable on summary conviction (*w*).

to railway trains ; *Railway Trains and Telegraphs.*—To put anything upon or across any railway, or to displace any rail, sleeper, &c. ; or (b) to interfere with the points or signals ; or (c) to do anything with intent to obstruct, upset, or injure any engine, tender, carriage, or truck using the railway, is a felony, punishable by penal servitude to the extent of life (*x*). If any of these offences have been committed by a young person, they may be dealt with summarily, and punished by fine or imprisonment for three months ; and in the case of a male under fourteen years of age, with whipping (*y*).

By any unlawful act, or wilful omission or neglect, to obstruct any engine or carriage using the railway, is a misdemeanor, punishable by imprisonment not exceeding two years (*z*).

to telegraphs ; To injure anything used in or about the telegraph, or in the working thereof ; or (b) to obstruct the sending of any message by such telegraph, is a misdemeanor, punishable by imprisonment not exceeding two years. But the magistrates, instead of sending the case for trial, may summarily dispose of it, awarding imprisonment not exceeding three months, or fine (*a*). To attempt by an overt act any of the offences included in the last section, is also visited with the same punishment on summary conviction (*b*).

to ponds and fish ; *Ponds and Fish.*—To destroy the dam, flood-gate, or

(*w*) s. 25.

(*x*) s. 35.

(*y*) 42 & 43 Vict. c. 49, s. 11.

(*z*) s. 36. For certain graver offences, v. p. 194.

(*a*) s. 37.

(*b*) s. 38

sluice of a fish-pond, or private water, with intent to take or destroy, or with result to cause loss or destruction of any of the fish; or (b) to put in lime, or other noxious material, with intent to destroy the fish; or (c) to destroy the dam or flood-gate of any mill-pond, reservoir, or pool, is a misdemeanor, punishable by penal servitude not exceeding seven years (c).

Animals.—To kill, maim, or wound any cattle, is a ^{to cattle;} felony, punishable by penal servitude not exceeding fourteen years (d).

To kill, maim, or wound any dog, bird, or beast, or ^{to other animals;} other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, is punishable on summary conviction, for the first offence, by imprisonment not exceeding six months, or penalty not exceeding £20 above the injury; for the second offence, imprisonment not exceeding twelve months (e).

To cruelly beat, ill-treat, over-drive, abuse or torture any animal, which includes any domestic animal, of any kind or species whatever and whether quadruped or not (f) is punishable by a penalty not exceeding £5 (g). To convey or carry any such animal in or upon any vehicle in such a manner or position as to subject it to unnecessary pain or suffering, is punishable, for the first offence, by a penalty not exceeding £3; and for the second and every subsequent offence, by a penalty not exceeding £5 (h). Sending parrots on a journey of over ten hours by rail-

(c) s. 32. v. 36 & 37 Vict. c. 71, s. 13.

(d) s. 40.

(e) s. 41.

(f) 17 & 18 Vict. c. 60, s. 3.

(g) 12 & 13 Vict. c. 92, s. 2.

(h) Ibid. s. 13.

way without water, is not such an offence, nor is a parrot such an animal (*i*).

to trees, &c.; *Trees, Plants, &c.*—To destroy or damage any tree, sapling, shrub, or underwood, growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining, or belonging to, any dwelling-house, provided that the amount of the injury done exceeds the sum of £1, or if the tree, &c., is growing elsewhere, provided that the amount exceeds £5, is a felony, punishable by penal servitude to the extent of five years (*j*). If the injury amounts to the value of one shilling at least, wheresoever the tree, &c., is growing, the offence is punishable, on summary conviction, by imprisonment not exceeding three months, or fine not exceeding £5 above the amount of the injury; for the second offence, imprisonment not exceeding twelve months; the third offence is a misdemeanor, punishable by imprisonment not exceeding two years (*k*).

to plants, &c.; To destroy or damage with intent to destroy, any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hot-house, greenhouse, or conservatory, is punishable, on summary conviction, by imprisonment not exceeding six months, or penalty not exceeding £20 above the amount of the injury; the second offence is a felony, punishable by penal servitude to the extent of five years (*l*). If the plant, &c., does not grow in such place, the offence is punishable, on summary conviction, by imprisonment to the extent of a month, or fine of twenty shillings; for the second offence, imprisonment not exceeding six months (*m*).

(*i*) *Swan v. Sanders*, 50 L. J. (M.C.) 67; 44 L. T. N. S. 424.

(*j*) ss. 20, 21.

(*k*) s. 22.

(*l*) s. 23.

(*m*) s. 24.

To cut, or otherwise destroy, any hopbinds growing on to hopbinds; poles in any plantation of hops, is a felony, punishable by penal servitude to the extent of fourteen years (n).

Works of art, &c.—To destroy or damage works of art, ^{to works of art.} &c., in public museums, &c.; or (b) pictures, statues, monuments belonging to places of worship, public bodies, or in public places, is a misdemeanor, punishable by imprisonment not exceeding six months (o).

Such are the particular cases provided for by the ^{General} statute; but in addition to these there are the following ^{provisions.} general provisions:—

Whosoever unlawfully and maliciously commits any ^{Where the} damage, injury, or spoil to or upon any real or personal ^{injury exceeds} property, either of a public or private nature, for which ^{£5.} no punishment has been provided in the Act, the damage, injury, or spoil being to an amount exceeding £5, is guilty of a misdemeanor, punishable by imprisonment not exceeding two years. If the offence is committed at night (*i.e.*, between the hours of nine in the evening and six in the morning), the offender is liable to penal servitude to the extent of five years (p).

And in cases where the damage does not exceed ^{Where the} £5, any person committing damage to any property ^{injury does not} may be summarily convicted before a magistrate, and ^{exceed £5.} punished by imprisonment not exceeding two months, or fine not exceeding £5, and also a further sum not exceeding £5 as compensation. But this section does not extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the thing complained of, nor to any trespass, not

(n) s. 19.

(o) s. 39.

(p) s. 51. v. R. v. *Pembilton*, L. R. 2 C. C. R. 119; 43 L. J. (M.C.) 91.

being wilful or malicious, committed in hunting, fishing, or in the pursuit of game (*q*).

Making or having dangerous or noxious thing with intent, &c.

Making or knowingly having in possession any gunpowder, or any dangerous or noxious thing, or any instrument or thing, with intent thereby, or by means thereof, to commit any of the felonies mentioned in the Act, is a misdemeanor, punishable by imprisonment not exceeding two years (*r*).

Certain general rules are appended to apply generally to all the offences dealt with in the Act:—

Particular malice need not be shewn.

It is not necessary to prove that the defendant was actuated by malice against the owner of the property (*s*).

No defence that offender was in possession of the property.

If a person, with intent to injure or defraud any other person, does any of the prohibited acts, it is no defence that he (the offender) was in possession of the property against, or in respect of which such act was done (*t*); as, for example, if a tailor or carrier wilfully and maliciously destroys goods intrusted to him.

Proof of general intent to defraud, &c., will suffice.

When it is necessary to allege an intent to injure or defraud, it is not necessary to allege in the indictment, or prove at the trial, an intent to injure or defraud any particular person; proof of a general intent to injure or defraud will suffice (*u*).

(*q*) s. 52.

(*r*) s. 54.

(*s*) s. 58.

(*t*) s. 59.

(*u*) s. 60.

BOOK III.

HAVING considered the essentials of crime in general, Criminal and examined the character of particular crimes, a procedure. second portion of the matter with which the Criminal Law is concerned now presents itself to our notice, namely, the *proceedings*, which have for their object the conviction of the guilty and the discharge of the innocent. But before entering upon the subject of Criminal Procedure, it will be well to inquire what measures the law has adopted in order to render those proceedings as far as possible unnecessary; in other words, to treat of the Prevention of Offences.

CHAPTER I.

PREVENTION OF OFFENCES.

Two classes of measures for the prevention of offences.

UNDER this head fall two classes of measures, differing considerably in their nature. The first is applicable chiefly in the case of those who have to some extent erred, but whom it is not deemed advisable to visit with punishment in the strict sense of the term. The second consists of general measures and provisions for the prevention of the commission or repetition of offences.

Finding securities.

A. The first mode of preventing offences may be generally said to consist in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and give full assurance to the public that the offences which are apprehended shall not happen. This is effected by their finding pledges or securities, which are of two kinds:—

i. For Keeping the Peace. ii. For Good Behaviour. But in the first place we shall go over the ground which is common to both.

The recognizance.

Of what does this “given security” consist? The person of whose conduct the law is apprehensive is bound, with or without one or more securities, in a recognizance or obligation to the Crown. This is taken by some court or by some judicial officer. The recognizance is of the nature following:—The person bound acknowledges himself to be indebted to the Crown in the sum specially ordered, with a condition that it

shall be void if he appear in court (a) on such a day, and in the meantime *keep the peace* either generally towards the sovereign and his people, or particularly also with regard to the person who seeks the security. Or, as is more usual, the recognizance may be to keep the peace for a certain period, an appearance in court not being required. If it be for good behaviour—then on condition that he demean and behave himself well, either generally or specially, for the time therein limited, as for one or more years, or for life. If the condition of the recognizance is broken, in the one case by any breach of the peace, in the other by any misbehaviour, the recognizance becomes forfeited or absolute. It is *estreated*, or extracted from the other records, and sent up to the Exchequer; the party and his sureties becoming the Crown's absolute debtors for the sums in which they are respectively bound (b). Forfeiture.

By whom may these securities be demanded? By any justice of the peace, and also by certain others who are regarded as conservators of the peace; for example, the judges of the Queen's Bench Division, the coroner, sheriff, &c. They may demand the security at their own discretion, or at the request of a subject upon his shewing due cause. If the magistrate is unwilling to grant it, it may be obtained by a mandatory writ, called a *supplicavit*, which will compel him to act as a ministerial and not as a judicial officer. But this writ is seldom used; for when application is made to the superior courts, they usually take the recognizance there, as they are empowered to do by statute (c). Who may demand securities.

Any person under the degree of nobility may be bound over either by a justice or at the quarter sessions. Wives may demand security against their hus- Who may be bound.

(a) v. Arch. Q. S. 269.

(b) 4 Bl. 252.

(c) v. 21 Jac. I, c. 8.

bands, and *vice versa*. Infants may demand security, and may be compelled to find security by their next friend.

The proceedings are the following in case of securities granted (a) by a justice out of sessions; (b) at the sessions.

Proceedings
before a magis-
trate;

(a.) If no sessions are sitting, the person requiring immediate security goes before a justice, and on oath makes his complaint, which is usually, though not necessarily, in writing. If the person complained of is present, he may be required at once to enter into the required recognizance; but if not present, the magistrate issues a warrant to bring him before himself or some other magistrate. The warrant is executed by the person to whom it is directed. If the delinquent refuses to go before the magistrate, he may be put into prison without any further warrant. When he comes before the magistrate, he must offer sureties, or else he may be committed to prison for a term not exceeding twelve months (d). The form of the recognizance is chiefly in the discretion of the magistrate both as to the number and the sufficiency of the sureties, the largeness of the sum, and the time for which the party shall be bound.

at sessions.

(b) By the sessions. Application may be made by the party requiring security at once to the sessions. And this is the more usual course. It should be made upon articles verified on oath, shewing the facts to warrant it. If the person refuses, or is not prepared to enter into the recognizance, he may be committed.

So far the two kinds of security are on the same footing. They must now be considered separately.

(d) 16 & 17 Vict. c. 30, s. 3.

i. *For the Peace*.—This may be granted (a) *generally, on public grounds*. Any justice may demand securities from the following: those who in his presence make an affray, or threaten to kill or beat one another; or who contend together with hot and angry words; or go about with unusual weapons or attendance to the terror of the people; also common barrators (e); and those who, having been bound to the peace, have forfeited their recognizances by breaking it (f). (b) *Specially*, by demand of a *private person* ("swearing the peace" against another). This security may be demanded by a person when he fears that another will kill him, his wife or child, or do him other corporal injury; or will burn his house; or will procure others so to do. The fear must arise from a threat, though that threat need not be expressed in words. The magistrate is required to grant the security if the applicant swears that he is in fear of death or bodily harm, and shews that there is ground for his fear; and swears that he is not acting out of malice or for mere vexation (g). Security for keeping the peace—generally;
specially.

The recognizance is forfeited (a) if *general*, by any unlawful action which is or tends to a breach of the peace; (b) if *special*, by any actual violence, or even terror or menace, to the person of the complainant, whether it be committed directly or indirectly by the person bound; (c) by default of appearance at the proper time, unless there be a valid excuse (h). A mere civil trespass, or words of anger not amounting to a challenge to fight, will not cause a forfeiture. Forfeiture.

ii. *For Good Behaviour or Abearance*.—This includes a surety for keeping the peace and something more. A magistrate may bind over to good behaviour. Security for good behaviour.

(e) v. p. 96.

(f) 4 Bl. 254.

(g) 4 Bl. 255.

(h) v. 16 & 17 Vict. c. 30, s. 2.

all those *that be not of good fame*. This general term includes not only those who act *contra pacem*, but also those who act *contra bonos mores*. It will comprise the following, among others (i):—rioters, barrators; those maintaining or constantly resorting to barrators; suspected persons who cannot give good account of themselves; those who are likely to commit any crime; drunkards; cheats; vagabonds, &c. (k).

Forfeiture.

This kind of recognizance may be forfeited for the same reasons as the former, and for others also, as by committing any of those acts of misbehaviour which the recognizance was intended to prevent, though there be no actual breach of the peace; but not by barely giving fresh cause of suspicion.

Security either where a crime has, or has not been committed.

Security may be required in two classes of cases: (a) where no actual crime has been committed; (b) where the party of whom security is taken has been convicted of some crime. In the latter case, if punishment is awarded, the court of summary jurisdiction may order the offender, at the expiration of his term of punishment, or if the punishment consists of a fine, at once to enter into a recognizance to keep the peace, or for good behaviour. Or again, instead of awarding any punishment, the court may order the defendant to enter into such recognizance. In certain cases where the defendant has been convicted of an indictable offence, namely, of an indictable offence punishable under one of the Criminal Consolidation Acts, 1861, he may be required to enter into his own recognizances and find sureties. In each of these Acts there is inserted a clause to the following effect:—On conviction of an indictable *misdemeanor* punishable under one of those Acts, the court may, if it think fit, in addition to or in lieu of any of the punishments authorized in the Act, fine the

Criminal Consolidation Acts.

(i) v. Burn, 759.

(k) Dalton, c. 124.

offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour. And in case of any *felony* punishable under one of those Acts, the court may require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment authorized by the Act. But no person is to be imprisoned under this clause for not finding sureties for any period exceeding one year (*l*).

B. We have now to consider certain general measures for the prevention of the commission of crimes, or their repetition. Provisions having this object in view are contained in an Act for the more effectual Prevention of Crime (*m*). This statute deals with a variety of matters (the design of which principally is to prevent the repetition of crime), which may be thus classified :—

General measures for prevention of crime.

i. As to *holders of licences* under the Penal Servitude Acts.—If, on their being brought by a constable before a court of summary jurisdiction, it appears that they are getting their living by dishonest means, their licences are forfeited. They are also punished on the breach of certain conditions. They are required to notify their residence to the police within forty-eight hours of their arrival in any place (*n*).

Holders of licences.

ii. *Identification* of persons who have been convicted.—Due provision is made for keeping the register of prisoners and making returns to the Home Secretary in England, the Lord Lieutenant in Ireland. The same authorities may make regulations for photographing prisoners (*o*).

Identification of offenders.

(*l*) 24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; c. 100, s. 71.

(*m*) 34 & 35 Vict. c. 112.

(*n*) Ibid. ss. 3-5. v. p. 475.

(*o*) Ibid. s. 6.

Offences by those who have been twice convicted.

iii. Persons who have been *twice convicted* of crime may be punished in certain cases, within seven years from the last conviction, by imprisonment not exceeding one year, *e.g.*, for appearing to obtain their livelihood by dishonest means, refusing to give their names when asked by a court of summary jurisdiction. They may be subjected to police supervision for seven years or less (*p*).

Acts conducing to crime.

iv. Penalties are prescribed for harbouring thieves, assaulting the police, purchasing less than specified quantities of old metal, &c. (*q*).

Search for stolen property.

v. Power is given to constables authorized by a chief officer of the police to enter houses, &c., *to search* for stolen property in premises which, within the last twelve months, have been in the occupation of persons who have been convicted of receiving stolen property, or harbouring thieves ; or are in occupation of persons who have been convicted of offences involving fraud or dishonesty, and punishable by penal servitude or imprisonment (*r*).

Evidence in trial for receiving.

vi. At a trial for receiving stolen goods certain evidence, not usually allowed, may be given (*s*).

(*p*) 34 & 35 Vict c. 112, ss. 7, 8.

(*q*) Ibid. ss. 10-13.

(*r*) Ibid. s. 16.

(*s*) Ibid. s. 19. v. p. 229.

CHAPTER II.

COURTS OF A CRIMINAL JURISDICTION.

In this chapter we shall treat of courts taking cognizance of indictable crimes, reserving for a subsequent chapter the consideration of courts of a summary jurisdiction (*t*). These courts are either of *general*, or of *local* and *special* jurisdiction. We are concerned chiefly with the former, and to them we now turn, and notice the several tribunals as far as possible in the order of their dignity.

Courts dealing with indictable crimes.

THE HIGH COURT OF PARLIAMENT.

This assembly proceeds to the punishment of offenders either in a *legislative* or a *judicial* capacity.

Court of Parliament.

When acting in the former of these capacities it cannot strictly be termed a court. It does not then sit to execute existing laws, but to make new ones. The occasions when its legislative functions are exercised to punish offenders are when *bills of attainder* or *bills of pains and penalties* are passed to punish particular persons for treason or felony, beyond and contrary to the common law, to serve a special purpose. They pass through the same stages as any other bill, though usually commencing with the Lords.

Bills of attainder or of pains and penalties.

When sitting in a *judicial* capacity the jurisdiction

(*t*) v. p. 478. As to Court for Crown Cases Reserved, v. p. 471.

of this, the highest court of the kingdom, is exercised in one of two modes :—

i. *Impeachment.*

ii. *Indictment.*

Impeachment. i. *Impeachment* before the Lords by the Commons.—The Commons act as prosecutors, inasmuch as it is the people, whom they represent, who are injured; the Lords form the tribunal. In place of an ordinary bill of indictment the charge against the offender is contained in the articles of impeachment. A peer may be impeached for any crime; a commoner may be impeached, at any rate for a misdemeanour, and, according to the better authorities, for any crime (*u*).

Pardon cannot be pleaded to impeachment. It should be remembered that it was provided by the Act of Settlement that no pardon under the Great Seal is pleadable to an impeachment by the Commons in Parliament. That is, the proceedings cannot be suppressed by the sovereign interfering with a pardon; though, when the matter has been inquired into, and judgment given, he may then exercise his royal prerogative of pardon. The proceedings on an impeachment are not brought to a termination by the prorogation or dissolution of Parliament (*x*).

Proceedings on impeachment. The proceedings are shortly the following (*y*). A member of the House of Commons charges the accused with the offence, and moves that he be impeached. On the House agreeing, the member is sent up to the bar of the House of Lords to impeach the accused in the name of the House of Commons and the Commons of the United Kingdom. A committee is appointed to draw up articles, which, on being agreed to, are

(*u*) May, 658.

(*x*) v. 26 Geo. 3, c. 96; 45 Geo. 3, c. 125.

(*y*) May, 660.

delivered to the Lords. The accused makes answer to these articles, and to his answer, which is communicated by the Lords to the Commons, replication, if necessary, is returned. The Lords then appoint a day for trial, the accused meanwhile being retained in custody, unless admitted to bail by the House of Lords. The Commons desire the Lords to summon witnesses, and they (the Commons) appoint managers to conduct the proceedings. The trial usually takes place in The trial. Westminster Hall, under the presidency of the Lord High Steward. But in cases other than impeachment of peers for high treason the Lord Chancellor or Lord Speaker presides. The president is not a judge, but only chairman, and has a vote with the rest in right of his peerage. The collective body of peers are the judges both of law and of fact. The Commons attend with the managers as a committee of the whole House. When the managers have made their charge they adduce evidence; and as to this, though a doubt was raised on the trial of Warren Hastings whether the Lords were bound by the same rules of evidence which prevail in ordinary criminal tribunals, that they are so bound is now established. The accused, who may be defended by counsel, answers the charge, and the managers reply. The president then puts to each peer, beginning with the junior baron, the question upon the first article, whether the accused be guilty of the crime charged therein. The peers in succession rise in their places when the question is put, and standing uncovered, and laying their right hands upon their breast, answer "Guilty," or "Not guilty, upon my honour." Each article is proceeded with separately; the president giving his opinion last. The numbers being ascertained, are delivered by the president. The Commons demand judgment, and this is pronounced by the president.

ii. *Indictment* before the House of Peers.—In this court Indictment. are tried peers and peeresses against whom an indictment

for treason or felony, or for misprision of either, is found during a session of Parliament. The indictment, that is, a true bill, is found in the ordinary way by a grand jury in the Queen's Bench Division, or at the assizes; the indictment being removed to the House of Peers by writ of *certiorari* (z). The peer may plead a pardon before the Queen's Bench Division, so as to avoid the trouble of appointing a high steward, &c., merely to receive that plea; but no other plea, as "guilty" or "not guilty," can be pleaded in the inferior court.

The trial.

The court is presided over by a Lord High Steward, appointed by commission under the great seal. He is not a judge, but chairman, and votes with the other peers. The privilege of being tried by this court depends upon nobility of blood, rather than upon the right to a seat in the House, as will appear from the considerations following. This kind of trial might have been claimed by a Popish peer at a time when he was incapable of sitting in the House; by a peer under age; by Scotch and Irish peers, though they be no representative; by females, namely, peeresses by birth, and those by marriage, unless when dowagers they have disparaged themselves by taking a commoner for a second husband (a). Also the bishops are not tried in this court, but in courts which have jurisdiction over commoners. As to the right of bishops to take part in the trials in the House of Peers, a resolution of the House in Danby's case has ever since been adhered to, "that the lords spiritual have a right to stay and sit in court in capital cases till the court proceeds to the vote of guilty or not guilty" (b). They then retire voluntarily, but not without entering a protest declaring their right to stay.

(z) v. p. 366.

(a) 4 Bl. 265.

(b) Lords' Journal, May 15th, 1679.

COURT OF THE LORD HIGH STEWARD OF GREAT
BRITAIN.

The trial by the House of Peers, as we have seen, Court of Lord High Steward. can only be held during the sitting of Parliament. During a recess this court takes its place.

Here, unlike the former tribunal, the Lord Steward The trial. is not merely chairman of the court, giving his vote with the rest. He is judge of matters of law, as the Lords triors are of matters of fact. Therefore, as a judge, he has no right to vote. A commission under the great seal confers the office of Lord High Steward for the particular occasion on some member of the House of Lords. When the indictment has been found, and removed by writ of *certiorari*, the Steward directs a precept to the serjeant-at-arms to summon the Lords to attend the trial. In cases of treason, or misprision thereof, there must be summoned all the peers who have a right to sit and vote in Parliament (c). The decision is by the majority, which must consist of twelve at the least. Bishops cannot be summoned to this court, nor have they the right of being tried there.

QUEEN'S BENCH DIVISION OF THE HIGH COURT.

This court has jurisdiction both in criminal and in civil cases; the former on the Crown side, the latter on the Plea side. On the Crown side it takes cognizance of criminal causes from high treason down to the most trivial misdemeanor or breach of the peace. But its criminal jurisdiction is rarely exercised, unless the circumstances of the case are of an extraordinary character, and demand an investigation which could not be had in the ordinary course of things. Queen's Bench Division.

Its *original* jurisdiction includes all offences com- Original jurisdiction.

mitted in Middlesex, which may be prosecuted in this court by indictment; and misdemeanors committed in any county of England may be prosecuted herein by information filed by the Attorney-General *ex officio*, or at the instance of a private individual prosecuting in the Crown Office by leave of the court. But this jurisdiction is very rarely exercised; crimes committed in Middlesex being tried at the Central Criminal Court. The grand jury are summoned only when the Master of the Crown Office has received due notice of some business to be brought before the court (*d*).

Transferred
jurisdiction.

Its *transferred* jurisdiction is much more extensive. To it indictments from all inferior courts may be removed by writ of *certiorari*; but (unless it be an indictment against a body corporate not authorized to appear by attorney in the court in which the indictment is preferred, or unless it be at the instance of the Attorney-General acting on behalf of the Crown) only under one of the following circumstances: that it has been made clear by the party applying for the writ to the court from which the writ is to issue (*i.e.*, the Queen's Bench), (a) that a fair and impartial trial cannot be had in the court below; or (b) that some question of law of more than usual difficulty and importance is likely to arise upon the trial; or (c) that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for the satisfactory trial of the same (*e*). And the same statute, still further to prevent the vexatious removal of indictments into the Queen's Bench, enacts that no *certiorari* is to issue to remove an indictment unless recognizances be given for the payment of costs in case of failure by the party applying for the removal (*f*).

(*d*) 35 & 36 Vict. c. 52.

(*e*) 16 & 17 Vict. c. 30, s. 4.

(*f*) *Ibid.* s. 5.

As to the mode of trial in this court. In cases of felony or treason the trial is *at bar*, that is, before the judges of the court sitting *in banc*. In misdemeanors the trial, if of sufficient importance, is at bar; otherwise at *nisi prius*. There are certain differences, according as the trial is in the one or the other way; but into these we need not enter. The Queen's Bench Division is empowered to order certain offenders to be tried at the Central Criminal Court (*g*).

Trial at bar on
at *nisi prius*.

On account of the dignity of the Queen's Bench Division, as the highest court of criminal jurisdiction over ordinary offenders, if that court comes into any county (*h*), all former commissions of oyer and terminer and general gaol delivery are at once *ipso facto* absorbed and determined. But this does not apply to the Central Criminal Court, which is held without regard to whether the Queen's Bench Division is sitting or not (*i*); nor does it apply to the Middlesex Sessions (*j*).

Inferior courts
superseded by
the Queen's
Bench.

The tribunals hitherto noticed, as a rule, exercise their jurisdiction irrespective of place; those to which we now turn are general but local, that is, found all over the kingdom, but each attached to a particular district.

ASSIZES.

The heading we have just prefixed to a description of this class of tribunals is the popular, but not the technical, designation of the courts of *Oyer and Terminer* and *General Gaol Delivery*, which are periodically held in every county in the kingdom. We may anti-

Assizes, where
and when
held.

(*g*) 19 Vict. c. 16.

(*h*) As it was removed to Oxford on account of the plague of 1665.

(*i*) 25 Geo. 3, c. 18; 32 Geo. 3, c. 48.

(*j*) This court, however, is not in strictness a court of oyer and terminer.—Hal. Sum. 165.

cipate by noticing that for offences committed in London, Middlesex, and certain suburbs in Essex, Kent, and Surrey, the Central Criminal Court has been established; and that, though assizes have been abolished for the rest of Surrey, judges have been sent there in virtue of a special commission.

The assizes were formerly held in each county twice in the year, namely, in the spring and summer, and in some places in the winter also. The Winter Assizes Act, 1876 (*k*), gave power to the Queen, by Order in Council, to unite counties for the purpose of winter assizes, and to appoint places of trial, &c. These provisions have since been extended (*l*), so as to apply to both winter and spring assizes, held in the months of September, October, November, December, January, March, April, or May. And now assizes are held four times a year for the trial of prisoners—viz., twice under the old system, such assizes commencing in January and soon after midsummer respectively in every county; and twice in winter and spring, under the provisions of the Winter Assizes Act.

Circuits.

For the purposes of the assizes the country is divided into eight *circuits*, over each of which the judges travel, holding courts at all the county and other assize towns. In the spring and summer two judges are assigned to each circuit, except the Welsh circuits, to which only one is sent, the judges of the two Welsh circuits meeting and sitting together in the counties of Cheshire and Glamorgan. In the winter the arrangements are irregular. The circuits as at present constituted are the following:—

i. Northern (Westmoreland, Cumberland, and Lancaster).

(*k*) 39 & 40 Vict. c. 57.

(*l*) 40 & 41 Vict. c. 46; 42 Vict. c. 1.

ii. North-Eastern (Northumberland, Durham, and York).

iii. Midland (Lincoln, Derby, Nottingham, Warwick, Leicester, Northampton, Rutland, Buckingham, and Bedford).

iv. South-Eastern (Norfolk, Suffolk, Huntingdon, Cambridge, Hertford, Essex, Kent, and Sussex).

v. Oxford (Berkshire, Oxford, Worcester, Stafford, Salop, Hereford, Monmouth, and Gloucester).

vi. Western (Hants, Wilts, Dorset, Devon, Cornwall, and Somerset).

vii. North Wales and Chester (Montgomery, Merioneth, Carnarvon, Anglesey, Denbigh, Flint, and Chester) (*m*).

viii. South Wales (Pembroke, Cardigan, Carmarthen, Brecknock, Radnor, and Glamorgan) (*n*).

It will be well to explain in virtue of what authority the judges preside at the assizes, as there is commonly a misconception in the matter. This authority is fourfold, consisting of the following commissions:—
 (a.) Of *Oyer and Terminer*. This commission, empowering to try treasons, felonies, and misdemeanors, is directed to certain judges and others. But only the judges, serjeants-at-law, Queen's counsel, and barristers with patents of precedence, are of the quorum; so that the others cannot act without the presence of one of them. Under this commission persons may be tried whether in custody or on bail; but as the words of the commission are "to inquire, hear, and determine," they can only proceed upon an indictment found at the same assizes; for they must first inquire by means of the grand jury before they are empowered to hear and

Commissions
under which
the judges sit.

(*m*) v. *supra*.
 (*n*) v. *supra*.

determine by the help of the petty jury. Therefore, a further commission is necessary (o). (b.) Of *Gaol Delivery*, directed to the judges, serjeants, and Queen's counsel, the clerk of the assize and associate, empowering them to try every prisoner in the gaol committed for any offence whatever, so that the gaols may be cleared of those awaiting trial. (c.) Of *Nisi Prius* (for the trial of civil causes). (d.) Of the *Peace*, by which all justices are bound, under pain of fine, upon notice to attend the judges and to assist them, if required, in such matters as lie within their knowledge and jurisdiction, for example, to return recognizances, &c. (p).

It will be noticed that the judges do not sit in virtue of their position as judges of the High Court at Westminster; but as commissioners specially sent down.

Commis-
sioners.

When the state of business requires it, they are often assisted by Queen's counsel or serjeants, so that sometimes as many as four or five commissioners are sitting at the same time (q).

In this way there is a general clearance of prisoners awaiting their trial at least twice (practically now three times) a year. On urgent occasions, as of offences demanding immediate inquiry and punishment, the sovereign issues a *special* or extraordinary commission of oyer and terminer and gaol delivery for the special

(o) v. 4 Bl. 270.

(p) 4 Bl. 278.

(q) It is provided by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 37), that the sittings of the judges of the High Court under commissions of assize, oyer and terminer, and gaol delivery, shall be held by or before judges of the Queen's Bench, Common Pleas, or Exchequer Divisions of the High Court: provided that the Queen may include in such commission any ordinary judge of the Court of Appeal, or any judge of the Chancery Division to be appointed after the commencement of the Act, or any serjeant-at-law, or any Queen's counsel, who shall then have the power, authority, and jurisdiction of a judge of the said High Court. By the Act of 1875 (38 & 39 Vict. c. 77, s. 8), future judges of the Probate, Divorce, and Admiralty Division are to share in this work. See also s. 29 of the Act of 1873, and 13 & 14 Vict. c. 25.

trial of such offences, and those only. The proceedings are generally the same as on ordinary commissions.

THE HIGH COURT OF ADMIRALTY.

The ancient court of the Lord High Admiral had jurisdiction for the trial of offences at sea or on board ships lying in the rivers below bridge (*r*). By the Act 28 Hen. 8, c. 15, the king was authorized to issue commissions under the great seal to the admiral and his deputies to try certain offences (*s*) committed at sea or within the jurisdiction of the admiral in the same way as if committed upon the land. In practice this jurisdiction was exercised by the judge of the Admiralty Court.

Now the Central Criminal Court and the justices of assize and commissioners of *Oyer and Terminer* and *General Gaol Delivery* have the power to try all offences committed on the high seas or within the jurisdiction of the Admiralty, although the power still exists of issuing a special commission under the Act of Hen. 8 (*t*).

The jurisdiction of the Admiralty in the case of British ships and all persons on board them, extends not only over the high seas, but also in foreign rivers as far as great ships go; although the municipal authorities of the foreign country may have concurrent jurisdiction (*u*). In the case of foreign ships and persons other than British subjects, it extends over the territorial waters of Her Majesty's dominions, which include the high seas to a distance of one marine

(*r*) 13 Rich. 2, c. 5; 15 Rich. 2, c. 3.

(*s*) Treasons, felonies, robberies, murders, and conspiracies; extended by 39 Geo. 3, c. 37, to all offences.

(*t*) 4 & 5 Wm. 4, c. 36, s. 22; 7 & 8 Vict. c. 2. The courts in the colonies have also cognizance of offences committed within the Admiralty jurisdiction. 11 & 12 Wm. 3, c. 7; 46 Geo. 3, c. 54; 12 & 13 Vict. c. 96; 18 & 19 Vict. c. 91, s. 21; 41 & 42 Vict. c. 73.

(*u*) *R. v. Anderson*, L. R. 1 C. C. R. 161; 38 L. J. (M.C.) 12.

league from low water mark (*x*). The jurisdiction of the Admiralty is also extended over offences committed by any master, seaman, or apprentice who at the time of, or within three months before, the offence was employed in any British ship, ashore or afloat, out of Her Majesty's dominions (*y*); also over offences committed on board a British ship whilst lying afloat and moored to the quay, in the ordinary course of her trading in a foreign river (*z*).

All indictable offences mentioned in the Criminal Law Consolidation Acts, 1861, if committed within the jurisdiction of the Admiralty, are subject to the same punishments, and may be tried in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner as if the offence had been committed in that county or place (*a*).

CENTRAL CRIMINAL COURT.

Central Criminal Court.

This court has generally the same jurisdiction as the assizes. It was established in 1834 for the trial of treasons, felonies, and misdemeanors, committed within the city of London and county of Middlesex, and in certain specified parts of the counties of Essex, Kent, and Surrey; such district for this purpose being regarded as one county (*b*). The judges sit under commissions of oyer and terminer and gaol delivery. The sessions of the court are required to be holden at least twelve times a year, and oftener if need be; the particular dates being fixed each year at a meeting of the judges. It has been recently held that the Central

(*x*) 41 & 42 Vict. c. 73; passed in consequence of the decision in *R. v. Keyn*, L. R. 2 Ex. D. 63; 46 L. J. (M.C.) 1.

(*y*) Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 267.

(*z*) *R. v. Carr*, 10 Q. B. D. 76; 52 L. J. (M.C.) 12; 47 L. T. N. S. 450.

(*a*) 24 & 25 Vict. c. 94, s. 9; c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; c. 100, s. 68.

(*b*) 4 & 5 Wm. 4, c. 36.

Criminal Court is a superior court, and mandamus will not lie to compel the judges and justices thereof to order restitution of stolen goods under 24 & 25 Vict. c. 100 (c).

The commissioners or judges of the court are the Lord Mayor, Lord Chancellor or Lord Keeper, the Judges of the High Court (except those who were not in office, and not liable before the commencement of the Judicature Act) (d), the Dean of the Arches, the Aldermen of London, the Recorder and Common Serjeant of London, the Judge of the City of London court, any person who has been Lord Chancellor, Lord Keeper, or a Judge of the High Court, and such others as the Crown from time to time may appoint. Usually at each session the recorder and common serjeant, and if the number of prisoners requires it, the judge of the City of London court, sit on the first two days; after which they are joined by the Westminster judges on the rota, who come down to try the more serious cases. On the bench there is also always either the Lord Mayor or one of the aldermen, who lends the dignity of his presence to the proceedings, but does not take any active part therein.

We have already seen (e) that offences committed within the jurisdiction of the Admiralty may be tried here; also that certain cases may be sent by the Queen's Bench Division to this court (f). Here also may be tried persons subject to the Mutiny Acts for the murder or manslaughter in England or Wales of any person subject to those Acts (g).

The Central Criminal Court has also a transferred jurisdiction.

(c) *R. v. The Justices of the Central Criminal Court*, 52 L. J. (M.C.) 121.

(d) 36 & 37 Vict. c. 66, s. 11.

(e) v. p. 305.

(f) v. p. 301.

(g) 25 & 26 Vict. c. 65.

jurisdiction. Indictments found at the various sessions of the peace within the district of its jurisdiction may be removed to it by *certiorari* (*h*), and justices of the peace may deliver over indictments found at the sessions to this court, as to the judges on circuit (*i*).

Sessions not
interfered
with.

The sitting of the Central Criminal Court does not interfere with the sessions of the peace held within the district, that is, the latter may be held notwithstanding that the former tribunal is sitting (*j*).

QUARTER SESSIONS.

Sessions.

These courts, which are held for the trial of criminals as well as for other objects, are of two kinds:—

i. The General (Quarter) Sessions of the Peace for the county.

ii. The Borough Sessions.

County quar-
ter sessions.

i. *The General County Sessions* must be held in every county once every quarter at stated times, in which case they are termed the general quarter sessions of the peace. And if, on account of the amount of business, it is necessary that courts of this description should be held intermediately, they are termed general sessions of the peace. The authority and jurisdiction of the court under either title is the same, except where the jurisdiction is given by statute expressly to the court of quarter sessions.

Time of
holding.

The dates fixed by statute for the holding of the county quarter sessions are the first weeks after each of the following days—October 11th, December 28th, March 31st, June 24th (*k*). But the date of the April

(*h*) 4 & 5 Vict. c. 36, s. 16.

(*i*) Ibid. s. 19.

(*j*) 4 & 5 Vict. c. 36, s. 21.

(*k*) 11 Geo. 4 & 1 Wm. 4, c. 70, s. 35.

quarter sessions may be altered by the justices to any time between March 7th and April 22d, in order that the sessions may not clash with the assizes (*l*). In addition to the sessions at these regular intervals, the justices may hold general sessions of the peace at such other times as they think fit, when the state of the business requires this to be done. If the sessions last more than one day, they must be adjourned to another (not necessarily the next), and so on until the work is finished.

The court is held before two or more justices of the peace, one of whom must be of the *quorum* (*m*). When the number of prisoners is large, a second court may be formed with the same authority as the first (*n*). In each court a chairman presides, and acts in general as a judge, consulting the other justices present when he thinks fit.

Who compose
the court.

Formerly this court had the power of trying any felony or misdemeanor committed in the county, and the commission in its present form does not limit their jurisdiction (*o*). But the justices usually remitted the more serious felonies to the assizes; a clause in the commission providing that if any difficulty should arise, the justices of the peace should not give judgment unless in the presence of the justices of the one or the other bench (*i.e.*, Queen's Bench or Common Pleas), or of one of the justices appointed to hold the assizes in the aforesaid county. But now the criminal jurisdiction

Jurisdiction of
the sessions.

(*l*) 4 & 5 Wm. 4, c. 47.

(*m*) The force of this limitation is, however, obsolete. In the commission of peace to inquire of and determine felonies and misdemeanors committed in the county, a clause is inserted directing some particular justices, or one of them, to be always included, so that no business may be done without their presence. The clause runs thus: "*Quorum aliquem vestrum A., B., C., D., unum esse volumus*;" whence the justices so named were usually termed "justices of the *quorum*." But now the practice is to make all of the justices of the *quorum*.

(*n*) 21 & 22 Vict. c. 73, ss. 9-11.

(*o*) As to Forgery and Perjury, v. Arch. Q. S. 6, 7.

Crimes not
triable at
sessions.

of the sessions is expressly by statute confined to the trial of small felonies and misdemeanors. And it is to be noticed that the justices in sessions cannot try any newly-created offence, unless the statute which creates it expressly gives them power. The chief statute limiting their jurisdiction (*p*) precludes them from trying any of the following crimes:—

1. Treason, murder, or any capital felony.
2. Any felony which, when committed by a person not previously convicted of felony, is punishable by penal servitude for life.
3. Misprision of treason.
4. Offences against the Queen's title, prerogative, person, or government, or against either House of Parliament.
5. Offences subject to the penalties of *præmunire*.
6. Blasphemy and offences against religion.
7. Administering and taking unlawful oaths.
8. Perjury and subornation of perjury.
9. Making, or suborning any other person to make, a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor.
10. Forgery.
11. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern.
12. Bigamy and offences against the laws relating to marriage.
13. Abduction of women and girls.

14. Endeavouring to conceal the birth of a child.

15. Offences against any provision of the laws relating to insolvents (offences against any provision of the law relating to bankrupts may be tried at the Quarter Sessions since 32 & 33 Vict. c. 62, s. 20).

16. Composing, printing, or publishing blasphemous, seditious, or defamatory libels.

17. Bribery.

18. Unlawful combinations and conspiracies, except conspiracies and combinations to commit any offence which the justices or recorder have or has jurisdiction to try when committed by one person.

19. Stealing, or fraudulently taking, or injuring, or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein.

20. Stealing, or fraudulently destroying or concealing, wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments.

By other statutes their jurisdiction does not extend to the trial of:—

21. The misdemeanor of three or more persons pursuing game by night (9 Geo. 4, c. 69, s. 9).

22. Bribery or undue influence at parliamentary elections (17 & 18 Vict. c. 102, s. 10).

23. Fraudulent misdemeanors, as agents, trustees, bankers, factors, &c., provided against by the Larceny Act, 1861, sections 75–86 (24 & 25 Vict. c. 96, s. 87).

24. Offences against the False Personation Act, 1874 (37 & 38 Vict. c. 36, s. 3).

Appeals heard
at sessions.

The court also hears *appeals* against summary convictions, in cases where the right of appeal is expressly given by statute to the person convicted. Under certain circumstances already noticed (*q*) an indictment may be removed from the sessions to the Queen's Bench by writ of *certiorari*.

Review of
proceedings of
sessions.

In appeals and other cases where the justices in sessions are made judges of the fact as well as of the law, their decision is final, and cannot be reversed by any court without their consent. But if they have a difficulty, they may put the facts in the form of a special case for the opinion of the Queen's Bench Division, meanwhile confirming or quashing the order before them. Their action will then be confirmed or quashed by the superior court. In ordinary criminal cases the only way in which the proceedings can be inquired into after judgment is by writ of error, &c.; a subject which will be treated of hereafter (*r*).

Middlesex
Sessions.

The *Middlesex Sessions* require a separate notice. By statute (*s*) two sessions or adjourned sessions of the peace are to be held every calendar month. The first sessions in January, April, July, and October, are the general quarter sessions of the county; and the second in those months are the adjournments of the general quarter sessions. So that others are styled general sessions of the county. But the distinction is rendered unimportant by a provision that every general sessions of the county of Middlesex and adjournments thereof, shall have the power, &c., of a general quarter sessions of that county (*t*). There are usually sitting at the Middlesex Sessions held at Clerkenwell Green two judges. In one court is the assistant judge, appointed by the Queen, being a barrister of ten years' standing,

(*q*) v. p. 300.

(*r*) v. p. 468.

(*s*) 7 & 8 Vict. c. 71; 22 & 23 Vict. c. 4.

(*t*) 22 & 23 Vict. c. 4, s. 4.

and in the commission of the peace for the county. In the other court sits the deputy assistant judge, appointed by the assistant judge (*u*). A temporary assistant judge may be appointed under certain circumstances (*v*).

ii. *Borough Sessions*.—Many corporate towns or boroughs have quarter sessions of their own. This exempts them in almost every matter from the jurisdiction of the county sessions. The borough sessions have, in general, the same jurisdiction as the county sessions (*w*), being subject to the same limitations as to the trial of certain offences. The court is held at least once in every quarter of a year; or at such other and more frequent times as the recorder may think fit, or as the Queen may be pleased to direct (*x*). The recorder of the borough, who must be a barrister of five years' standing, is the sole judge, though he may be assisted in the trial of criminals by some other barrister; and in case of his absence may appoint a deputy.

The Council of any borough may obtain a grant of a separate court of quarter sessions by petitioning the Queen in Council, and setting forth satisfactory grounds to substantiate the application. Two or more boroughs conjointly may have such a court (*y*).

COURT OF THE CORONER.

The business of this court is to inquire when any one dies in prison, or comes to a violent or sudden death, by what means he came to his end. If the verdict in this inquisition is murder or manslaughter, the coroner must commit the prisoner for trial. But,

(*u*) 7 & 8 Vict. c. 71; 14 & 15 Vict. c. 55, s. 14.

(*v*) 22 & 23 Vict. c. 4, s. 3.

(*w*) 5 & 6 Wm. 4, c. 76, s. 105, &c.

(*x*) Ibid.

(*y*) Ibid. s. 103.

as we shall see in a subsequent chapter, the finding of the coroner's jury is practically unimportant (z).

There have been certain criminal courts of a private or special jurisdiction, which are restricted both in respect of the place and of the cause. One example alone of this class remains, and it is not of any great importance (a).

UNIVERSITY COURTS IN OXFORD AND CAMBRIDGE.

University
courts.

Both universities enjoy a certain exemption from the ordinary criminal tribunals; but at Cambridge the privilege cannot be claimed if any person not a member of the university is a party (b). In order to take advantage of this immunity, the proper course is, *after* the indictment has been found by the grand jury at the assizes or elsewhere against a scholar or other privileged person, for the Vice-Chancellor to claim the cognizance of the matter, and then it will be sent to one of the following courts:—

High Stew-
ard's court.

High Steward's Court.—It has jurisdiction over cases of treason, felony, or mayhem committed by a privileged person. The process at Oxford is as follows:—A special commission is issued to the High Steward and others to try the particular case. The High Steward issues one precept to the sheriff of the county, who returns a panel of eighteen freeholders, and another to the university bedels, who return a panel of eighteen matriculated laymen. The indictment is then tried in the Oxford Guildhall by a jury *de medietate*, half of freeholders and half of such matri-

(z) v. p. 349.

(a) The Court of the Lord Steward, Treasurer, or Comptroller of the King's Household, to inquire if any one in the household imagined, &c., the death or destruction of the king, his privy councillors, or certain other officers; and the court of the Lord Steward of the King's Household, to inquire of murders and other crimes whereby blood has been shed in the king's palaces or abodes, are both obsolete.

(b) 19 & 20 Vict. c. 17, s. 18.

culated laymen. If the accused is found guilty of a capital offence, the sheriff must execute the university process, to which he is bound by an oath (c).

Vice-Chancellor's Court.—This court has authority to try all misdemeanors committed by privileged members of the university. The judge is the Vice-Chancellor. Vice-Chancellor's court.

This exceptional jurisdiction is rarely, if ever, exercised, the Vice-Chancellor's court meeting for other purposes. Formerly, however, on several occasions cases of murder and other crimes were tried in the High Steward's court.

Petty sessions and summary proceedings before single magistrates will be noticed hereafter (d).

SKETCH OF A CRIMINAL TRIAL.

We propose now to discuss in their proper order the various steps taken to secure the punishment of a criminal who is guilty of a felony or misdemeanor, in other words, to examine the proceedings in any ordinary criminal case (e). But before doing this, it will be

(c) 4 Bl. 277.

(d) v. p. 478. We may mention two courts which, as far as criminal matters are concerned, have totally fallen into desuetude—the Sheriff's Tourn and the Court Leet, or View of Frank Pledge. They had the same jurisdiction, namely, the trial of trivial misdemeanors; that of the former extending to the whole county, that of the latter to a particular hundred, lordship, or manor. Another court may be said to be virtually superseded—the Court of the Clerk of the Market. Its chief business was to test the weights and measures, and to punish by fine if they were not according to the standard. Now an inspector of weights and measures, or a magistrate, may enter any place where goods are exposed for sale, and if the weights and measures are found incorrect, may seize and forfeit them; and the party in whose possession they are found, or who obstructs the examination, is fined a sum not exceeding £5. 41 & 42 Vict. ss. 25, 48.

(e) That is, a case which is not dealt with summarily before the magistrates, or specially before some exceptional tribunal, as the House of Lords.

well to sketch a rough outline or map of the whole ground to be traversed before the offender suffers his punishment.

Outline of
proceedings in
a criminal
case.

The first thing to be done is to lay hold of the prisoner, or to *arrest* him. When he is arrested and brought before the magistrates, if they think the case ought to be sent on to trial, he is *committed* for trial; the magistrates either at once committing him to prison to await the trial, or allowing him to remain at large on his finding sufficient *bail* to ensure his appearance when he is wanted. What particular *mode of prosecution* is to be adopted must be considered, as there are several ways of formal accusation. In most cases the prisoner will now be forthcoming to take his trial; but either on account of his having avoided the warrant of arrest, or because he has been admitted to bail and does not surrender, *process* must issue to bring him into court. For some good reason it may be desirable to remove the trial to the supreme criminal court by a writ of *certiorari*. The day of trial having arrived, the prisoner is *arraigned*, or called to the bar of the court to answer the charge against him. If he does not confess, or stand mute, he will then shew in what way he proposes to meet the charge, whether by *demurring* to the sufficiency in point of law of the charge; or by *pleading* some particular obstacle to his being convicted; or, generally, that he is not guilty. *Issue* is then joined, and the *trial* of the question in point takes place. The prisoner is said to be *convicted* on the jury finding a verdict of guilty; and *judgment*, and the other consequence of this conviction, follow. The effects of this judgment will, however, be avoided by its being *reversed*, or by the prisoner being *reprieved* or *pardoned*. Lastly, if the prisoner has been convicted of a capital crime, he must suffer *execution*.

CHAPTER III.

ARREST.

The apprehending or restraining of a man's person, in order to insure his being forthcoming to answer an alleged or suspected crime (*f*). Any person is liable to an arrest on a criminal charge, provided he is charged with such a crime as will at least justify holding him to bail when taken. Arrest, definition of.

An arrest may be made either :—

A. By warrant.

B. Without warrant. Here we shall have to distinguish three cases. Where the arrest is (a) by an officer; (b) by a private person; (c) by hue and cry.

A. A *warrant* is a precept under hand and seal to Warrant. some officer to arrest an offender, that he may be dealt with according to due course of law.

A warrant may, under certain circumstances, be granted by the Speaker of the House of Lords or House of Commons; or by the Privy Council; or by one of the secretaries of state. A judge of the Queen's Bench Division may issue a warrant to bring before him for examination any person charged with felony. He may also issue his warrant for apprehending and holding to bail any person, upon affidavit or certificate of the fact By whom granted.

(*f*) It is almost unnecessary to remind the reader that a person may under certain circumstances be arrested in a civil proceeding, and not only for a crime.

that an indictment has been found, or information filed in that court against any such person for a misdemeanor (*g*). Courts of oyer and terminer (*i.e.*, in general the assizes and Central Criminal Court) and the justices at sessions may also issue warrants against those against whom indictments for felony or misdemeanor have been found within their jurisdiction.

Warrants usually granted by magistrates out of sessions.

The above cases are of an exceptional character. Warrants are ordinarily issued by justices of the peace, not sitting in sessions. The law on this subject was consolidated by 11 & 12 Vict. c. 42 (*h*).

When a warrant will be issued.

In what cases may it be issued.—When a charge or complaint has been made before one or more justices that a person has committed or is suspected to have committed any treason, felony, or indictable misdemeanor, or other indictable offence, within his or their jurisdiction; or that, having committed it elsewhere (even within the Admiralty jurisdiction or on land beyond the seas (*i*)), he resides within his or their jurisdiction; then, if the accused is not in custody, two courses are open to the justice; (a) to issue a *warrant* to apprehend and bring the accused specially before himself, or generally, before other justices of the jurisdiction; or (b) to issue, in the first place, a *summons* directed to the accused, requiring him to appear before himself, or other justices of the jurisdiction; and then, only if the summons is disobeyed by non-appearance, to issue a warrant (*j*).

A justice will also issue a warrant to apprehend a person against whom an indictment has been found, on the production to him of the certificate of the clerk of

(*g*) 48 Geo. 3, c. 58, s. 1.

(*h*) This statute does not affect the Metropolitan Police, or the London Police Acts.

(*i*) 11 & 12 Vict. c. 42, s. 2.

(*j*) *Ibid.* s. 1.

indictments at the assizes, of the peace at the sessions. If the party indicted is already in custody for some other offence, the justice may issue his warrant to the gaoler, commanding him to detain the accused until he shall be removed by *habeas corpus* for the purpose of being tried on the indictment, or until he shall otherwise be removed or discharged out of his custody in due course of law (*k*).

To enable a justice to issue a warrant in the first instance (*i.e.*, as in (*a*) above), it is necessary that an information and complaint in writing, on the oath or affirmation of the informant, or of some other witness on his behalf, should be laid before the justice. But if a summons only is to be issued in the first instance, the information may be by parol and without oath (*l*). The information.

The *summons* is directed to the accused. It states The summons. shortly the charge, and orders him to appear before the justice issuing it, or some other justice of the jurisdiction, at a certain time and place. It is served by a constable on the accused personally, or at his last and usual place of abode (*m*).

The *warrant* is directed to a particular constable, or The warrant. to the constables of the district where it is to be executed, or generally to the constables of the jurisdiction

(*k*) 11 & 12 Vict. c. 42, s. 3.

(*l*) *Ibid.* s. 8.

(*m*) *Ibid.* s. 9. The following is an example of a summons:—

“To John Styles, of, &c., labourer. Whereas you have this day been charged before the undersigned, one of Her Majesty’s justices of the peace in and for the said county of * * *, for that you on, &c. (*the offence stated shortly*): These are therefore to command you in Her Majesty’s name, to be and appear before me on Thursday, the 15th day of June, at eleven o’clock in the forenoon at * * * or before such other justice or justices of the peace for the said county as may then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

“Given under my hand and seal, this 13th day of June, in the year of our Lord 1876, at * * *, in the county aforesaid.

“J. H. (L. S.).”

of the issuing justice. It states shortly the offence and indicates the offender, ordering the constable to bring him before the issuing justice, or other justices of the same jurisdiction. It remains in force until executed, the execution being effected by the due apprehension of the accused (*n*). It may be issued on Sunday as well as on any other day (*o*).

Backing the warrant.

A warrant from the chief or other justice of the Queen's Bench Division extends all over the kingdom, and is *tested*, or *dated*, England, not Oxfordshire, Berks, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be *backed*, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed in the latter (*p*). But the justice backing, in certain cases, may require the accused to be brought before him, or some other justice of the jurisdiction (*q*). A warrant issued in England may be backed not only in another jurisdiction in England, but also in Scotland, Ireland, or the Channel Islands, and *vice versa* (*r*).

Executing the warrant.

When a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the justice and himself extends. And a warrant drawn up according to the statutory form will (even though the magistrate who issued it has exceeded his jurisdiction),

(*n*) 11 & 12 Vict. c. 42, s. 10. An example of a warrant:—

"To the constable of * * * * and to all other peace officers in the said county of * * * *. Whereas A. B. of * * * *, labourer, hath this day been charged upon oath before the undersigned, one of Her Majesty's justices of the peace in and for the said county of * * * *, for that he on * * * * at * * * * did, &c. (*stating shortly the offence*): These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before me, or some other of Her Majesty's justices in and for the said county, to answer unto the said charge, and to be further dealt with according to law.

"Given under my hand, &c." (*as in the case of a summons*).

(*o*) Ibid. s. 4.

(*p*) 4 Bl. 291.

(*q*) Ibid. s. 11.

(*r*) Ibid. ss. 12–15. See also 14 & 15 Vict. c. 55, s. 18. As to the colonies, 6 & 7 Vict. c. 34, and 16 & 17 Vict. c. 118.

at all events, indemnify the officer who executes the same ministerially (*s*). The officer in his own jurisdiction need not shew his warrant if he tells the substance of it. Bare words will not constitute an arrest without laying hold of the accused, or otherwise restraining his liberty. The officer may break open doors to execute a warrant for treason or other felony, or a breach of the peace, if upon demand of admittance it cannot otherwise be obtained (*t*). An arrest for any indictable offence may be made on Sunday; and, for felonies or breaches of the peace, in the night-time as well as the day.

If there is just cause, any justice or the sheriff may take of the county any number he thinks proper to pursue, arrest, and imprison traitors, felons, and breakers of the peace (raising the *posse comitatus*); persons refusing to aid may be fined and imprisoned (*u*). *Posse comitatus.*

A *general* warrant to apprehend *all* persons suspected of a crime is void. So is a warrant to apprehend the authors, printers, and publishers of a libel, without naming them (*v*). General warrants to take up loose, idle, and disorderly people, and search warrants, are perhaps the only exceptions to this rule (*w*). *General warrants.*

Though not strictly belonging to the subject in hand, namely, the arrest of criminals, it may be convenient here to notice *search warrants*. On the oath of a complainant that he has probable cause to suspect that his property has been *stolen*, reason for his suspicion being shewn, a justice may issue a warrant to search the premises of a person suspected of the felony. And as to *Search warrants.*

(*s*) 24 Geo. 2, c. 44.

(*t*) As to killing a constable in the execution of his duty, v. p. 174; as to when he is justified in killing the accused, v. pp. 156, 175.

(*u*) Dalton, c. 171.

(*v*) *Money v. Leach*, 1 Bl. W. 555.

(*w*) 5 Burn, 1131.

property otherwise the subject of fraudulent practices, it is provided that if any credible witness proves upon oath before a justice a reasonable ground for suspecting that any person has in his possession, or on his premises, any property with respect to which an offence punishable under the Larceny Act, 1861, has been committed, he may grant a warrant to search for such property, as in the case of stolen goods (x).

B. Arrests *without warrant*.

Arrests without warrant, by officers;

As to arrests by *officers*, they may be made by

i. *Justices of the Peace*, who may themselves apprehend, or cause to be apprehended, by words only, *i.e.*, without warrant, any person committing a felony or breach of peace in their presence (y).

ii. The *sheriff* may apprehend any felon or breaker of the peace within the county.

iii. The *coroner*, any felon within the county.

by constables.

iv. A *constable* may arrest, without warrant, any one for treason, felony, or breach of the peace committed in his view, within his jurisdiction, and carry him before a magistrate. So, also, on reasonable charge of felony, or of having given a dangerous wound; or upon reasonable suspicion that one of the above offences has been committed, though it should afterwards appear that no felony or wounding had been committed. But, as a rule, he may not arrest without warrant in a misdemeanor, though he may interpose to prevent a breach of the peace, and to accomplish this object he may arrest the person menacing, and detain him in custody till the chance of the threat being executed is over (z). Also he may arrest without warrant, and then must

(x) 24 & 25 Vict. c. 96, s. 103.

(y) As to apprehension, &c., for contempt in face of court, v. p. 105.

(z) v. 2 Hale, P. C. 88.

take before a justice of the peace as soon as reasonably may be, any person whom he finds lying or loitering in any highway, yard, or other place, during the night, and whom he has good cause to suspect of having committed, or of being about to commit, any felony against the Larceny, Arson and Malicious Injuries to Property, or Offences against the Person Acts respectively (a). Also he may take into custody any holder of a licence granted under the Penal Servitude Acts, who is reasonably suspected of having committed any offence, or broken any of the conditions of his licence (b).

If, upon a reasonable charge for which he may arrest without warrant, the constable refuses, he may be indicted and fined. When he acts without a warrant, by virtue of his office as constable, he should, unless the party is previously acquainted with the fact, or can plainly see it, notify that he is a constable, or that he arrests in the Queen's name, and for what.

The constable's right to break open doors, his justification in killing in the execution of his duty, and the consequences of his being killed, are generally the same as if he had proceeded upon a warrant (c).

v. Arrests by *private persons*.—Any person who is present when a felony is committed, not only may, but is bound, without warrant, to arrest the offender. And a private person is bound to assist an officer who demands his aid in the lawful taking of a felon, or the suppression of an affray. If in any case the felon escapes through his negligence to assist, for which there is no good excuse, he is liable to fine and imprisonment. A private person also may arrest (a) any

Arrest by private persons.

(a) 24 & 25 Vict. c. 96, s. 104; c. 97, s. 57; c. 100, s. 66.

(b) 27 & 28 Vict. c. 47, s. 6. As to arrest of persons likely to commit crimes under the Prevention of Crime Act, v. p. 294. Special Acts regulate the powers of constables within the Metropolitan Police District.

(c) v. pp. 174, 175, 320.

one whom he finds committing an indictable offence by night (*i.e.*, 9 P.M. to 6 A.M.) (*d*); or (b) a person committing *any* offence (except angling in the daytime) punishable under the Larceny Act (*e*); or (c) a person committing an offence against the Coinage Act (*f*). Also the owner of the property injured, or his servant, or any other person authorized by him, may apprehend a person committing any offence against the Malicious Injuries to Property Act (*g*). Any person to whom property is offered to be sold, pawned, or delivered, if he has reasonable cause to suspect that any offence punishable under the Larceny Act has been committed with respect to such property, is authorized and required to forthwith take the party offering and the property offered before a magistrate (*h*).

Arrest by private persons on suspicion.

A private person may also arrest, without warrant, on reasonable *suspicion* of felony. But he does so at his peril, and is liable to the consequences of false imprisonment, unless he can afterwards prove that a felony has actually been committed by some one, and that there was reasonable ground to suspect the person apprehended. (It will be remembered that a peace officer is not liable, although no crime has been committed, if there were reasonable grounds for suspicion.) Not that the private person has no course left open to him; he is justified in requiring a constable to do whatever the constable by virtue of his office is justified in doing.

Points in which arrests on suspicion and in view of the crime differ.

There is this distinction between arrests in view of the crime and on suspicion by private persons. In the former case he may break open doors to effect the arrest; and the consequences of his killing or being killed are generally the same as if an officer were

(*d*) 14 & 15 Vict. c. 19, s. 11.

(*e*) 24 & 25 Vict. c. 96, s. 103.

(*f*) *Ibid.* c. 99, s. 31.

(*g*) *Ibid.* c. 97, s. 61.

(*h*) *Ibid.* c. 96, s. 103. As to arrest in game offences, v. p. 14.

arresting. But if the arrest by a private person is merely on suspicion, he is not justified in breaking open doors; and if either party kills the other, it is said to amount to manslaughter at the least.

A private person may arrest another for the purpose of putting a stop to a breach of the peace committed in his presence.

Arrest upon Hue and Cry.—The old common law Hue and cry. process of pursuing with horn and with voice all felons and such as have dangerously wounded others. The hue and cry may be raised by constables, private persons, or both. The constable and his assistants have the same powers, protection, and indemnification as if acting under the warrant of a magistrate; and if they have obtained a warrant, they may follow by hue and cry into a different county from that in which the warrant was granted, without getting it backed. Private persons who join are justified, even though it should turn out that no felony has been committed. But if a person wantonly, and maliciously, and without cause raises the hue and cry, he is liable to punishment as a disturber of the peace (i).

Rewards for the Apprehension of Offenders.

In connection with the subject of arrest, we may notice some encouragements which the law holds out for exertions in bringing certain classes of criminals to justice. When any person appears to a court of oyer and terminer and gaol delivery to have been active in the apprehension of any person charged with any of the following offences, viz., murder, feloniously and maliciously shooting, &c., at any person, stabbing, cutting, poisoning, administering anything to procure

(i) For punishment of assaults committed on officers and persons acting in their aid, or on any other person lawfully authorized to apprehend or detain an offender, v. p. 195.

Rewards
allowed at
sessions.

miscarriage, rape, burglary or felonious housebreaking, robbery from the person, arson, horse, bullock (including ox, cow, &c.), or sheep stealing; or with being accessory before the fact to any of the offences aforesaid; or with receiving stolen property knowing the same to have been stolen, the court is authorized to order the sheriff to pay to such person such sum of money as it thinks proper to compensate for his expense, exertion, and loss of time in the apprehension. This reward is to be over and above the ordinary payments to prosecutors and witnesses (*j*). By a later statute, at the sessions the court may order such compensation to be paid in case of any of the above offences which they have jurisdiction to try; but the payment to one person must not exceed £5 (*k*). If any one is killed in endeavouring to apprehend a person charged with one of these offences, the court may order compensation to be made to the family (*l*). The amount to be paid in all such cases is subject to regulations which may be made from time to time by the secretary of state (*m*).

(*j*) 7 Geo. 4, c. 64, s. 28.

(*k*) 14 & 15 Vict. c. 55, s. 8.

(*l*) 7 Geo. 4, c. 64, s. 30.

(*m*) 14 & 15 Vict. c. 55, s. 5.

CHAPTER IV.

PROCEEDINGS BEFORE THE MAGISTRATE.

WHEN an arrest has been made the accused should be taken before a magistrate or magistrates with all reasonably possible speed. When arrested on suspicion he should not be detained before he is so taken, in order that evidence may first be collected.

Accused to be taken before the magistrate.

The magistrate is bound to forthwith examine into the circumstances of the charge. In order to secure the attendance of witnesses to the fact, they may be served with a summons or warrant in a manner similar to that in which the presence of the accused is insured. If a witness refuses to be examined, he is liable to imprisonment for seven days (n). The room in which the examination is held is not to be deemed an open court; and the magistrate may exclude any person if he thinks fit (o). When the witnesses are in attendance, the magistrate takes, in the presence of the accused (who is at liberty by himself or his counsel to put questions to any witness produced against him), the statement on oath or affirmation of those who know the facts of the case, and puts the same in writing. These statements (technically termed *depositions*) are then read over to and signed respectively by the witnesses who have been examined, and by the magistrate taking such statements (p). The magistrate reads, or causes

Proceedings before the magistrate.

The depositions.

(n) 11 & 12 Vict. c. 42, s. 16. As this is the chief Act dealing with the subject of this chapter, reference merely to a section must be understood of that statute.

(o) s. 19.

(p) s. 17.

to be read over to the accused these depositions; and asks him if he wishes to say anything in answer to the charge; cautioning him that he is not obliged to say anything, but that whatever he does say will be taken down in writing, and may be used in evidence against him at his trial; at the same time explaining that he has nothing to hope from any threat which may have been holden out to him to induce him to make any admission or confession of guilt. Whatever the accused then says is taken down in writing, and signed by the magistrate (*q*).

Witnesses for
the accused.

The magistrate then asks the accused whether he desires to call any witnesses. If he does, the magistrate, in the presence of the accused, takes their statement on oath or affirmation, whether such statement is given on examination or cross-examination, for they may be submitted to both. These statements, in the same way as those on the part of the prosecution, are read to and signed by the witnesses and by the magistrate. And the same rules apply to witnesses both for the prosecution and for the defence (other than those merely to character), as to being bound over by recognizance to appear and give evidence at the trial (*r*). If a witness refuses to enter into such recognizance, he may be committed to prison until the trial. The recognizances, depositions, &c., are transmitted to the court in which the trial is to take place (*s*).

Binding over
the witnesses.

Remand

If the investigation before the magistrate cannot be completed at a single hearing, he may from time to time *remand* the accused to gaol for any period not exceeding eight days; or may allow him his liberty in the interval upon his entering into recognizances, with or without sureties, for re-appearance (*t*).

(*q*) s. 18.

(*r*) 30 & 31 Vict. c. 35, s. 3.

(*s*) s. 20.

(*t*) s. 21.

If, when all the evidence against the accused has been heard, the magistrate does not think that it is sufficient to put the accused on his trial for an indictable offence, he is forthwith discharged. But if he thinks otherwise, or the evidence raises a strong or probable presumption against the accused, he commits him for trial, either at once sending him to gaol so as to be forthcoming for trial, or admitting him to bail (u). Under certain circumstances a third course is open to the magistrate; he may dispose of the case and punish the offender himself (v).

It will be noticed that there are two forms of commitment to prison: (a) *for safe custody*; (b) *in execution*, either as an original punishment, or as a means of enforcing payment of a pecuniary fine, or of enforcing obedience to the sentence or order of a magistrate or the sessions. The warrant of commitment under the hand and seal of the committing magistrate, directed to the gaoler, contains a concise statement of the cause of commitment. By the Habeas Corpus Act (w) the gaoler is required, under heavy penalties, to deliver to the prisoner, or other person on his behalf, a copy of the warrant of commitment or detainer within six hours after demand. The imprisonment of which we are now speaking is merely for safe custody and not for punishment; therefore, those imprisoned are treated with much less rigour than those who have been convicted. Thus, they may have sent to them food, clothing, &c., subject to examination and the rules made by the visiting magistrates. They have the option of employment, but are not compelled to perform any hard labour; and if they choose to be employed, and are acquitted, or no bill is found against them, an allowance is paid for the work (x).

(u) s. 25.

(v) v. p. 478.

(w) 31 Car. 2, c. 2, s. 5.

(x) 28 & 29 Vict. c. 126, sched. i. ss. 19, 20, 32, 33.

Bail.

Bail.—This admitting to bail consists in the delivery (or bailment) of a person to his sureties, on their giving security (he also entering into his own recognizances) for his appearance at the time and place of trial, there to surrender and take his trial. In the meantime, he is allowed to be at large; being supposed to remain in their friendly custody.

We shall, in the first place, treat of the law of bail by the magistrate, and then of bail by the Queen's Bench Division and other exceptional cases.

In what cases
a magistrate
may bail.

In what cases may, and in what cases may not a magistrate take bail? Not if the prisoner is accused of *treason*. In that case it is allowed only by order of a secretary of state, or by the Queen's Bench Division, or a judge thereof in vacation. If the prisoner is charged with some other *felony*, or one of the *misdemeanors* enumerated below, the magistrate may, in his discretion, but is not obliged to, admit to bail. These misdemeanors are:—Obtaining, or attempting to obtain, property by false pretences; receiving property stolen or obtained by false pretences; perjury or subornation of perjury; concealing the birth of a child by secret burying or otherwise; wilful or indecent exposure of the person; riot; assault in pursuance of a conspiracy to raise wages; assault upon a peace officer in the execution of his duty or upon any person acting in his aid; neglect or breach of duty as a peace officer, or any misdemeanor for the prosecution of which the costs may be allowed out of the county rate. In other misdemeanors it is imperative on the magistrate to admit to bail (*y*).

Principles
guiding magis-
trates, when
they may
exercise their
discretion as
to bail.

In cases where, in the exercise of their discretion, the magistrates have the power of admitting to bail or refusing it, the principle which is to guide them is the

probability of the accused appearing to take his trial, and not his supposed guilt or innocence (z). Though this latter point may be one element to be considered in applying the test. Thus it has been laid down that the points which the court will consider in exercising their discretion include the seriousness of the charge, the evidence in support of it, and the punishment which the law awards for the offence (a). Practically, in charges of murder, bail is never allowed. And when a bill has been found against the accused, naturally more caution will be exercised.

Who may be bail? The magistrate (or court, v. The sureties. *infra*) will act according to his discretion as to the sufficiency of the bail. The proposed bail may be examined upon oath as to their means, though in criminal cases no justification of bail is required. A married woman, an infant, or a prisoner in custody, cannot be bail; nor can a person who has been convicted of an infamous crime, as perjury (b). The usual number of bail is two; but sometimes only one is required, and sometimes three or more. The sureties or bail are not compelled to act as such for a longer time than they wish. If they surrender the accused before the magistrate or court by whom he has been bailed, he will be committed to prison, and they will be discharged of their obligation. But the accused may then find fresh sureties.

Both at common law and by statute (c), to refuse or delay to bail any person bailable is a misdemeanor in the magistrate. But it has been held that the duty of a magistrate in respect of admitting to bail is a

(z) *R. v. Scatfe*, 5 Jur. 700.

(a) *In re Baronet*, 22 L. J. (M.C.) 25; *In re Robinson*, 23 L. J. (Q.B.) 286. See also *R. v. Stephen Butler*, 14 Cox, 530.

(b) *v. R. v. Edwards*, 4 T. R. 440.

(c) 3 Edw. 1, c. 15; 31 Car. 2, c. 2 (Habeas Corpus); 1 Wm. & M. st. 2, c. 1 (Bill of Rights).

judicial duty ; and therefore that not even an action can be maintained against him for refusing to admit to bail, where the matter is one as to which he may exercise his discretion (*d*). It is provided by the Bill of Rights Excessive bail. that excessive bail ought not to be required ; though what is excessive must be left to be determined by the court in considering the circumstances of the case. If the magistrate or other authority admits to bail where this is not allowable, or if he takes insufficient bail, he is liable to punishment on the non-appearance of the accused (*e*).

Bail after
committal
for trial.

The stage in the proceedings where the question of bail usually arises is when the accused is before the magistrates. But when a person charged with an indictable offence has been committed to prison to await his trial, it is lawful at any time afterwards, before the first day of the sessions or assizes at which he is to be tried, for the magistrate who signed the warrant for his commitment to admit him to bail (*f*).

As to bail in other cases than in proceedings before the magistrates :—

Bail by
Queen's Bench
Division.

The *Queen's Bench* Division, or, in vacation time, a judge thereof (*g*), has a discretionary power of admitting to bail a prisoner charged with any indictable offence, or on suspicion thereof ; and this whether he is brought before the court by a writ of *habeas corpus* or otherwise. The decision of a Divisional Court on a question of bail is a judgment of the High Court in a criminal matter, and there is no appeal to the Court of Appeal (*h*). It may bail as well in cases where bail has been refused

(*d*) *Linford v. Fitzroy*, 18 L. J. (M.C.) 108 ; *R. v. Badger*, 12 L. J. (M.C.) 66.

(*e*) *Hale's Sum.* 97.

(*f*) 11 & 12 Vict. c. 42, s. 23.

(*g*) 1 & 2 Vict. c. 45.

(*h*) *R. v. Foote*, 10 Q. B. D. 378 ; 48 L. T. N. S. 394.

by the magistrate, as when the charge has been originally brought before the Division. It may order the accused to be admitted to bail before a magistrate when it is inconvenient to bring him and his bail up to town.

It seems to be a good general rule that so far as any persons are judges of any crime, so far they have the power of bailing a person indicted before them of such crime (i); so that:—

Bail by judicial officers.

Justices in Sessions may bail persons indicted at the sessions.

Judges of Gaol Delivery, &c., may bail those indicted at the assizes or Central Criminal Court when they are sitting. If one accused of treason or felony is not tried at the first sessions of gaol delivery after commitment, he may demand to be released or bailed, unless it appears on oath that the witnesses for the prosecution could not be present at those sessions. If he is not tried at the second sessions, he must be discharged from imprisonment (j).

Coroners are authorized to admit to bail persons charged with manslaughter by verdict of the coroner's jury (k).

It may be noticed here that at any time between the conclusion of the examination before the magistrate and the first day of the trial at the assizes or sessions, the accused, whether held to bail or committed to prison for trial, may have on demand copies of the examination of the witnesses upon whose depositions he has been so held to bail or committed, on payment of a

The accused may have copies of the depositions.

(i) 2 Hawk. c. 15, s. 54.

(j) 31 Car. 2, c. 2, s. 7.

(k) 22 Vict. c. 33, s. 1. As to personating bail, v. p. 248.

reasonable sum for the same, not exceeding three half-pence for each folio of ninety words (*l*). And at the time of trial he may inspect the depositions without any fee (*m*). The same rules apply also to depositions on behalf of the prisoner (*n*).

Delivery of
recognizances,
&c., to the
court.

The recognizances whereby the prosecutor and witnesses are bound over to appear at the trial, together with the written information (if any); the depositions; the statement of the accused; the recognizances of bail (if any); are to be delivered to the proper officer of the court where the trial is to be had (*o*).

(*l*) 6 & 7 Wm. 4, c. 114, s. 3; 11 & 12 Vict. c. 42, s. 27.

(*m*) 6 & 7 Wm. 4, c. 114, s. 4.

(*n*) 30 & 31 Vict. c. 35, s. 4.

(*o*) 11 & 12 Vict. c. 42, s. 20; 30 & 31 Vict. c. 35, s. 3.

CHAPTER V.

MODES OF PROSECUTION.

THE accused has either been committed to prison for safe custody, or has been left at liberty in virtue of his having found sureties for his appearance. The next point to be considered is the prosecution (*p*), or manner of formal accusation. This may be either (*q*):—

Modes of
prosecution.

A. Upon a previous finding of the fact by an inquest or grand jury.

B. Without such previous finding.

A. The most usual mode is by indictment, though it will be necessary in the first place to say a few words on—

After a finding
by the grand
jury.

Presentment.—This term, taken in a wide sense, includes both indictments by a grand jury and inquisitions of office. In a narrow sense it refers to the former only, and is the notice taken by a grand jury of any matter or offence from their own knowledge or observations, without any bill of indictment laid before them at the suit of the Crown, as the presentment of a libel, &c., upon which the officer of the court must afterwards frame an indictment before the party prosecuted can be put to answer it (*r*). So that it differs from

Presentment.

(*p*) In a wide sense the term "prosecution" is applied to the whole of the proceedings for bringing the offender to justice.

(*q*) 4 Bl. 301.

(*r*) Ibid.

the ordinary proceedings merely inasmuch as no bill is delivered by an individual prosecutor, but the grand jury initiate the proceedings.

Inquisition.

An *Inquisition* of office is the act of a jury summoned to inquire of matters relating to the Crown upon evidence laid before them. The most common kind of inquisition is that of the coroner, which is held with a view to find out the cause of death. The accused is arraigned upon the inquisition (s).

**Indictment,
when it lies.**

An *Indictment* is a written accusation of one or more persons of a crime, preferred to, and presented on oath by, a grand jury. It lies for all treasons and felonies, for misprisions of either, and for all misdemeanors of a public nature at common law (t). If a statute prohibits a matter of public grievance, or commands a matter of public convenience (such as the repairing of highways, or the like), all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment if the statute specifies no other mode of proceeding (u). If the statute specifies a mode of proceeding different from that by indictment, then, if the matter was already an indictable offence at common law, and the statute introduces merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law, or by the mode pointed out by the statute (x).

**Indictment,
its form.**

We shall presently deal with the preferment of an indictment to the grand jury; but first we must examine into the nature of such form of accusation.

(s) v. p. 348.

(t) 2 Hawk. c. 25, s. 4.

(u) Ibid.

(x) *R. v. Robinson*, 2 Burr. 799.

And for this purpose it will be well to give an example of an indictment, say for larceny at common law :—

“ Suffolk, to wit: The jurors for our Lady the Queen upon their oath present that ¶ John Styles, on the 1st day of June, in the year of our Lord 1876, three pairs of shoes, and one waistcoat, of the goods and chattels of John Brown, feloniously did steal, take, and carry away; ¶ against the peace of our Lady the Queen, her crown and dignity.”

Three parts marked off in the above form are to be distinguished: (a) the Commencement; (b) the Statement; (c) the Conclusion.

(a) *The Commencement.*—In this the only part which requires comment is the *venue*, or the statement of the county or other division from which the grand jury by whom the indictment was found have come. In other words, it is the index of the place where, in regular course, the trial is to be had (*y*). The consideration of this matter will be reserved for a separate chapter.

(b) *The Statement.*—This, the principal part of the indictment, must set forth with certainty all the facts and circumstances essential to constitute the crime; and must directly charge the accused with having committed it.

The defendant's *name* must be given correctly; or, if it is not known, he must be described as a person unknown. So also with regard to the name of the person against whom the crime has been committed.

The *ownership* of any property in respect of which the offence was committed must be rightly laid.

(y) v. 14 & 15 Vict. c. 100, s. 23.

property in goods (a) of a deceased person must be laid in the executors or administrators; (b) of a married woman in her husband, unless there is separate property, or the proceedings are instituted under the Married Women's Property Act, 1882, in which case the property must be laid in the wife (z), or there has been a judicial separation, or a protection order (a). If the goods belong to partners or joint-owners, one only need be named, and "another" or "others" added, as the case may be (b). So property vested in a body of persons must not be described as the property of the body, but of all or some individuals of the body, unless it is incorporated. The property of joint-stock banking co-partnerships may be laid in any one of the public officers (c). Bridges, asylums, &c., must be described as the property of the inhabitants of the county, without specifying any names. If goods are stolen, &c., from a bailee, they should be described as the property either of the bailor or of the bailee, unless they were stolen by the bailor himself. If at the trial it appears that the property has been incorrectly laid, or the person against whom the offence was committed misnamed, unless such error be amended, the defendant must be acquitted. But, as we shall see (d), the court has extensive powers of ordering amendment in case of such variance between the indictment and the evidence.

**Time of
offence.**

As to the statement of *time*.—No indictment will be held insufficient because it omits to state the time at which the offence was committed in any case where time is not of the essence of the offence; nor because it states the time imperfectly, or states the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a

(z) 45 & 46 Vict. c. 75, s. 12; see also 33 & 34 Vict. c. 93, s. 11.

(a) 20 & 21 Vict. c. 85, ss. 21, 25.

(b) 7 Geo. 4, c. 64, s. 14.

(c) *Ibid.* s. 9.

(d) *v.* p. 351.

day that never happened (*e*). The time is of importance in several crimes, as in murder, bigamy, and burglary, and in cases where the time within which the prosecution must be commenced is limited.

As to *place*.—The nature of the crime in some cases requires this to be stated: otherwise the venue in the margin, that is the county or other division, is taken as the venue for all facts in the indictment (*f*). The following are the most common cases in which a local description is required: burglary, housebreaking, stealing in a dwelling-house, sacrilege, nuisances to highways, &c. Place of offence.

The facts, circumstances, and intent, which are the ingredients of the offence, must be given with certainty, so that the defendant may be able to perceive what charge he has to meet, the court may know what sentence should be given, and that on future reference to the conviction or acquittal it may be known exactly what was the alleged offence (*g*). In indictments for certain crimes particular technical words must be used, namely, in murder, *murdravit*; in rape, *rapuit*; in larceny, *felonice cepit et asportavit*. Again, as to the intent, treason must be laid to have been done “traitorously;” a felony, “feloniously;” burglary, “feloniously and burglariously;” murder, “feloniously and of his malice aforethought.” Description of facts, &c.
Technical words, when to be used.

If any essential ingredient of the offence is omitted, or not stated with sufficient certainty, the defendant may move to quash the indictment, or may demur, or, if the defect is not one which is cured by verdict (*h*), he may move in arrest of judgment, or bring a writ of error. All objections to formal defects must be taken Consequences of defects.

(*e*) 14 & 15 Vict. c. 100, s. 24.

(*f*) Ibid. s. 23.

(*g*) Arch. 56.

(*h*) As to what defects are cured by verdict, see *Heymann v. R.*, L. R. 8 Q. B. 102.

before the jury are sworn; and they may then be amended by the court (*i*).

Amendment
of defects.

The law as to the *amendment* of defects in the indictment is now on a much more reasonable footing than it was at one time. Instead of requiring the evidence rigorously and servilely to correspond with the indictment as it stands when drawn up, extensive powers of amendment are given to the court. Whenever there is a variance in certain points between the indictment and the evidence, it is lawful for the court before which the trial is had, if it considers that the variance is not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order the indictment to be amended on such terms as to postponing the trial, as the court thinks reasonable. The points mentioned in the statute are the following: (a) in the name of any county, riding, division, city, borough, town corporate, parish, township, or *place* mentioned or described in such indictment; or (b) in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the *owner* or owners of any property, real or personal, which shall form the subject of any offence charged therein; or (c) in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be *injured* or damaged, or intended to be injured or damaged, by the commission of such offence; or (d) in the Christian name or surname, or both Christian name and surname, or other description whatsoever of *any person* or person whomsoever therein named or described; or (e) in the name or description of *any matter* or thing whatsoever therein named or described; or (f) in the *ownership* of any property named or described therein (*k*). But in no case will an amend-

(i) 14 & 15 Vict. c. 100, s. 25.,

(k) Ibid. s. 1.

ment which alters the nature or quality of the offence be allowed (*l*). The amendment must be made before verdict; and when it is once made there can be no amending the amendment, or reverting to the indictment in its original form.

(c.) The *Conclusion*.—The conclusion given in the foregoing example of an indictment is that which occurs in an indictment for an offence at common law. An indictment for an offence created by statute concludes thus: "against the form of the statute in such case made and provided, and against the peace, &c." But an error in the form of the conclusion is not now material, inasmuch as it has been enacted that no indictment shall be held insufficient for the omission of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versa*; nor for want of a proper or formal conclusion (*m*).

The conclusion of the indictment.

Counts.—An indictment very frequently contains more than one count or charge. The object of the insertion of more than one count is either to charge the defendant with different offences, or with a previous conviction; or to describe the single offence in other terms, so that proof of one description failing, he may be convicted under another. Thus, an indictment for wounding generally contains a count for doing grievous bodily harm. Again, an indictment for obtaining goods by false pretences must state the false pretence correctly; therefore, in order to prevent a failure of

Counts, when more than one inserted.

(*l*) *R. v. Wright*, 2 F. & F. 320.

(*m*) 14 & 15 Vict. c. 100, s. 24. The same section also provides that no indictment shall be insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," nor for that any person is designated by a name of office or other descriptive appellation, instead of his proper name; nor for want of, or imperfection in, the addition of any defendant; nor for the want of the statement of the value or price of any matter or thing, or of the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence.

justice in consequence of the false pretence not being properly stated, it is often necessary to insert different counts laying the pretence in different ways. The different counts are tacked on by the insertion of "and the jurors aforesaid, upon their oath aforesaid, do say that, &c."

Charging more than one offence in the same count.

As a rule more than one offence cannot be charged in the same count. This is commonly expressed by saying that a count must not be *double*, or is *bad for duplicity*. Thus one count cannot charge the prisoner with having committed a murder and a robbery. There are two exceptions to the rule: An indictment for burglary usually charges the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended. And in indictments for embezzlement by clerks, or servants, or persons employed in the public service, or in the police, the prosecution may charge any number of distinct acts of embezzlement, not exceeding three, which may have been committed against the same master within six months inclusive (*n*). But even here it is usual to charge the different acts in different counts.

Charging different offences in different counts,

So much for charging different offences in one count. It remains to be seen what are the rules as to charging a defendant with different offences in different counts of the same indictment:—

in treason,

In an indictment for *treason*, there may be different counts, each charging the defendant with different species of treason; for example, compassing the Queen's death, levying war, &c.

in felony.

In an indictment for *felony*, there is no objection in point of *law* to charging several different felonies in

(*n*) 24 & 25 Vict. c. 96, s. 71; see also s. 5.

different counts, whether such felonies be of a different character or distinct cases of the same sort of felony ; for example, whether they be a burglary and a murder, or two cases of murder. But in *practice*, as this course would embarrass the prisoner in his defence, it is not adopted, and it will be ground for quashing the indictment, though not for demurrer or arrest of judgment. If it is discovered, before the jury are charged, that it has been done, the judge may quash the indictment ; if after, he may put the prosecutor to his election on which charge he will proceed. The same felony may, however, be charged in different ways in different counts ; as if there is a doubt whether the goods stolen are the property of A. or of B., they may be stated in one count as the goods of A., in another as the goods of B. There are certain exceptions to the rule forbidding the charging of distinct felonies in different counts. In an indictment for feloniously stealing any property, it is expressly declared lawful to add a count or several counts for feloniously receiving the *same* property, knowing it to have been stolen, and *vice versa* ; and the prosecutor is not put to any election, but the jury may find a verdict of guilty on either count, against all or any of the persons charged (o). Also, in an indictment for larceny, it is lawful to insert several counts against the same person for any number of distinct acts of stealing not exceeding three which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them (p). We have already noticed a similar rule with regard to embezzlement (q).

If a count for a *felony* is joined with a count for a *misdemeanor*, the indictment will be held bad if de- Joinder of a
felony and a
misdemeanor.

(o) 24 & 25 Vict. c. 96, s. 92.

(p) *Ibid.* s. 5.

(q) v. p. 353.

murred to, or judgment may be arrested if the verdict has been general (*i.e.*, guilty, or not guilty on the whole indictment), but not if the prisoner is convicted of the felony alone (*r*).

Charging different misdemeanors in different counts.

An indictment for *misdemeanor* may contain several counts for different offences, even though the judgments upon each be different, so that the legal character of the substantive offences charged be the same (*s*). Thus, evidence of several assaults or several libels will be received on the several counts of the same indictment. But there are limits, not precisely defined, to this rule; when convenience and justice demands it, the judge compelling the prosecution to elect upon which charge they will proceed. In all cases of this character, the important consideration is, whether all the acts were substantially one transaction.

Previous conviction, when count for.

In certain cases if the prisoner has been *previously convicted*, a count is inserted in the indictment charging him with such previous conviction. He will have to plead to this, and proof may be given, if he denies it, as on any other count. The object of putting in this count is that the prisoner may have his identity with the person so previously convicted proved before the severer punishment consequent on a previous conviction is awarded. The cases in which such a count may be inserted are indictments for (a) felonies (not misdemeanors) mentioned in the Larceny Act (*t*), or (b) for offences under the Coinage Act, provided that the previous conviction be for some offence against that or some other Coinage Act (*u*).

(*r*) *R. v. Ferguson*, 24 L. J. (M.C.) 61.

(*s*) *v. Young v. R.*, 3 T. R. 105.

(*t*) 24 & 25 Vict. c. 96, s. 116.

(*u*) 24 & 25 Vict. c. 99, s. 37. 27 & 28 Vict. c. 47, s. 2, seems to imply that a count for previous conviction of felony may be inserted in an indictment for any crime punishable with penal servitude. *Rosc.* 194.

It should be noticed that in some cases the necessity for adding a second count, or preferring a second indictment is obviated by the power which is given to the jury to find the defendant guilty of certain other offences than those named in the indictment (x). Verdict of offence other than that charged in the indictment.

As to the *joinder of two or more defendants* in one indictment.—When several persons take part in the commission of an offence, they may all be indicted together, or any number of them together, or each separately; and, of course, some may be convicted and others acquitted. But certain offences do not admit of a joint commission, for example, perjury. This joinder of defendants may be made the subject of demurrer, motion in arrest of judgment, or writ of error: or the court will in general quash the indictment. Joinder of defendants.

As a rule, there is no *time limited* after the commission of a crime within which the indictment must be preferred. The offender is continually liable to be apprehended and visited with the penalties of the criminal law. By particular statutes, however, there are exceptions to this rule; a stated time being fixed after which criminal proceedings cannot be commenced. The chief cases, times, and the statutes regulating them, are the following:— Cases in which the time for prosecution is limited.

Treason, in general, if committed in Great Britain, three years, 7 & 8 Wm. 3, c. 3, s. 5.

Training to arms and military practice, six months, 60 Geo. 3 & 1 Geo. 4, c. 1, s. 7.

Gaming offences under the statute, twelve months, 9 Geo. 4, c. 69, s. 4.

Offences under the Customs Act, three years, 16 & 17 Vict. c. 107, s. 303.

Bribery at parliamentary elections, one year, 17 & 18 Vict. c. 102, s. 14; 26 Vict. c. 29, s. 5.

(x) v. p. 443.

Indictments or informations upon any statute penal, whereby the forfeiture is limited to the sovereign, two years, 31 Eliz. c. 5.

The above where the forfeiture is limited to the sovereign and prosecutor, one year, 31 Eliz. c. 5.

Indictment
drawn up and
indorsed.

The indictment is usually drawn up by an officer of the court; the clerk of arraigns or the clerk of indictments at the assizes, the clerk of the peace at the sessions; but in cases of difficulty the assistance of counsel is obtained. On the indictment are indorsed the names of the witnesses intended to be examined before the grand jury. Here we must leave it for a time, merely adding that of course any number of indictments may be preferred against the same person at the same time for distinct offences.

B. *Information.*

Information,
definition of.

A criminal information is a complaint by the Crown in the Queen's Bench Division in respect of some offence, not a felony, whereby the offender is brought to trial *without the previous finding by a grand jury (y).*

These criminal informations are of two kinds:—

- i. Informations *ex officio*.
- ii. Informations by the Master of the Crown Office.

Information *ex
officio*.

An information *ex officio* is a formal written sug-

(y) The term "information" is also used of (i.) the charge made to a magistrate of some offence punishable on summary conviction. (ii.) A complaint by one who is taking proceedings to recover a penalty, as where a statute awards a pecuniary penalty upon conviction for a given offence, and a judicial proceeding is instituted against some offender to recover the penalty. Inasmuch as the penalty is generally divided between the sovereign and the informer, *qui tam pro domina regina, quam pro se ipso, sequitur*, they are termed *qui tam* actions. (iii.) A complaint of the Crown in the Chancery or Exchequer Division in respect of some civil claim. (iv.) An information *quo warranto*, is a remedy in the Queen's Bench Division given to the Crown against such as have usurped or intruded into any office or franchise.

gestion of an offence, filed by the Attorney-General in the Queen's Bench Division. It lies for misdemeanors only ; for in treason and other felonies it is the policy of the English law that a man should not be put upon his trial until the necessity for that course has been shewn by the oath of the grand jury. The reason for the exceptional proceeding without the grand jury is that some cases will not admit of the delay involved in the usual course of events. Thus, the proper objects of this kind of information are such enormous misdemeanors as peculiarly tend to disturb or endanger the government, or to interfere with the course of public justice, or to molest public officers ; for example, seditious libels or riots, obstructing officers in the execution of their duties, bribery, &c., by magistrates or officers (2). If the Attorney-General delays for twelve months to bring the case on for trial, after due notice the court may authorize the defendant to do so. An information *ex officio* is in the following form :—

“ *Trinity Term, 25 Vict.*

“ *Middlesex.—Be it remembered that Sir William Atherton, Knight, Attorney-General of our Sovereign Lady the Queen, who for our said Lady the Queen prosecutes in this behalf, in his proper person comes into the court of our said Lady the Queen before the Queen herself at Westminster, in the county of Middlesex, on,” &c. &c. (stating the facts, &c., and concluding as in an indictment).*

ii. Information by the *Master of the Crown Office*.—Information by Master of the Crown Office.
A formal written suggestion of an offence, filed in the Queen's Bench Division at the instance of an individual, by the Master of the Crown Office, without the intervention of a grand jury. Here, a point in which this differs from the former kind of information, the leave

(2) 4 Bl. 308.

of the court has to be obtained. It lies only for misdemeanors, usually those of a gross and notorious kind, which, on account of their magnitude or pernicious example, deserve the most public animadversion (those peculiarly tending to disturb the Government being usually left to the Attorney-General as above), for example, bribery at elections, aggravated libels, &c.

Proceedings on
information by
Master of the
Crown Office.

The course of proceedings is the following:—An application is made for a rule to shew cause why a criminal information should not be filed against the party complained of. This application must be founded upon an affidavit disclosing all the material facts of the case. If the court grants a rule *nisi*, it is afterwards, upon cause being shewn, discharged or made absolute as in ordinary cases.

The form of this kind of information is similar to that of an information *ex officio*, substituting the name of the Queen's coroner and attorney for that of the Attorney-General.

Information,
how tried.

When a criminal information has been filed either by the Attorney-General *ex officio* or by the Master of the Crown Office, it must be tried in the usual manner by a petty jury of the county where the offence arose. For that purpose, unless the case is of such importance as to call for a trial at bar, it is sent down by writ of *Nisi Prius* into that county and tried either by a common or special jury like a civil action. If the defendant is found guilty, he must afterwards receive judgment from the Queen's Bench Division (a).

Coroner's Inquisition (b).

Coroner's
inquisition.

A coroner's inquisition is the record of the finding of the jury sworn to inquire, *super visum corporis*, con-

(a) 4 BL 308.

(b) v. p. 313.

cerning the death. On this a person may be prosecuted for murder or manslaughter without the intervention of a grand jury, for the finding of the coroner's jury is itself equivalent to the finding of a grand jury. The defendant is arraigned on the inquisition as on an indictment; and the subsequent proceedings are the same. The practice is, when a prisoner stands charged on a coroner's inquisition with murder or manslaughter, to take him before the magistrate and to prefer also an indictment against him. Of course he is tried both on the inquisition and the indictment at the same time. Thus, the sum of the whole matter is that the finding of the coroner's jury and the inquisition are practically disregarded and useless as far as criminal proceedings are concerned.

The proceedings are shortly the following:—On receiving due notice of the sudden or violent death, the coroner issues his precept to the officers of the place where the body lies dead, requiring them to summon a jury (which must consist of twelve at least), and names the time and place of inquiry. At the court the jury are sworn, and then view the body. The witnesses are examined on oath, and their evidence is put into writing by the coroner. He has authority to bind by recognizance all material witnesses to appear at the assizes to prosecute and give evidence; and he must certify and subscribe the evidence and all such recognizances and the inquisition before him taken, and deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court (c).

Proceedings
before the
coroner.

The inquisition consists of three parts; the caption or *incipitur*, the verdict of the jury, and the attestation (d). The rules as to certainty, description, &c.,

The inquisi-
tion.

(c) 7 Geo. 4, c. 64, s. 4.

(d) For example, v. Arch. 131.

which prevail in the case of an indictment, apply also to an inquisition.

Committal for trial by coroner.

When the jury have returned a verdict of murder or manslaughter against a person, the coroner must commit him for trial, if present. If not in custody, the coroner may issue a warrant for his apprehension, and order him to be brought before himself or some magistrate of the jurisdiction (*e*).

Proceedings rarely otherwise than by indictment.

From the foregoing inquiry we find that, apart from proceedings by way of summary conviction, practically the only modes of criminal procedure are by way of indictment or information. Of these the former is much the more common; and, unless anything be stated to the contrary, it will be this mode that will be kept in view in the succeeding pages (*f*).

We have already seen (*g*) that a private individual is not obliged to set the law in motion for the prosecution of a criminal. But when he has given information or made complaint before a justice of the peace, on which the party charged with an indictable offence has been apprehended, he is then obliged to give evidence before such justice; and if the accused is committed for trial he may be, and usually is, bound over by recognizance to prosecute and give evidence (*h*).

Director of Public Prosecutions.

In order, however, to provide more effectually for the prosecution of offences, an Act has recently been passed to provide for the appointment of a Director of Public Prosecutions with a staff of assistants (*i*).

The duty of the Director of Public Prosecutions is

(*e*) As to bail by coroners, v. p. 333.

(*f*) The old mode of trial by *appeal*, involving a trial by battle, abolished after *Thornton's Case* (1 B. & Ald. 405), by 59 Geo. 3, c. 46, may just be mentioned.

(*g*) *Ante*, p. 98.

(*h*) 11 & 12 Vict. c. 42, ss. 16, 20.

(*i*) 42 & 43 Vict. c. 22.

set forth to be—to institute, undertake, or carry on under the superintendence of the Attorney-General criminal proceedings (whether in the Court for Crown Cases Reserved, before sessions of oyer and terminer or of the peace, before magistrates or otherwise), and to give such advice and assistance to chief officers of police, clerks to justices, and other persons, whether officers or not, concerned in any criminal proceeding, respecting the conduct of that proceeding, as may be for the time being prescribed under the Act, or may be directed in a special case by the Attorney-General (*j*).

The regulations (which are to be made from time to time by the Attorney-General, and after being laid before Parliament to be approved by the Lord Chancellor and a secretary of state) (*k*) are to provide for the Director of Public Prosecutions taking action in cases which appear to be of importance or difficulty, or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, appear to render the action of such Director necessary to secure the due prosecution of an offender (*l*).

The Act also provides for the transmission to the Director of Public Prosecutions of all recognizances, interrogations, depositions, &c., whenever he undertakes any criminal proceeding, or when a prosecution which has been instituted is not proceeded with within a reasonable time (*m*).

When a criminal proceeding is undertaken by the Director of Public Prosecutions, it is not necessary for any person to be bound over to prosecute, and any person who has been bound over is released from his obligation (*n*).

(*j*) 42 & 43 Vict. c. 22, s. 2.

(*k*) Ibid. s. 8.

(*l*) Ibid. s. 2.

(*m*) Ibid. s. 5.

(*n*) Ibid. s. 7.

CHAPTER VI.

PLACE OF TRIAL.

Place of trial usually the county, &c., in which the crime was committed.

WE have already intimated (*o*) that the venue in the indictment, or place from which the grand jury who have found the bill have come, is also, in regular course, the place where the trial is had. It is now necessary to ascertain what that place is. The general common law rule is, that the venue should be the jurisdiction within which the offence is committed; whether such jurisdiction be a county, a division of a county, a district including more than a county, as in the case of the Central Criminal Court, or a borough.

Exceptions.

To the general rule many exceptions have been made by statute; and these we now proceed to enumerate and classify:—

In any county.

i. The venue may be laid in any county (*p*) for the following offences:—

Extortion (*q*).

Resisting or assaulting officers of the excise (*r*).

Offences against the revenue of the customs (*s*).

Endeavouring to seduce soldiers or sailors from their duty, or inciting them to mutiny (*t*).

In county of crime, or where defendant is apprehended or in custody.

ii. The venue may be laid in the county where the

(*o*) v. p. 337.

(*p*) By "county" in this chapter must be understood county, division of county, district, or borough, as the case may be.

(*q*) v. 31 Eliz. c. 5, s. 4.

(*r*) 7 & 8 Geo. 4, c. 53, s. 43.

(*s*) 16 & 17 Vict. c. 107, s. 304.

(*t*) 37 Geo. 3, c. 70, s. 2; 57 Geo. 3, c. 7.

offence was committed, or where the offender is apprehended, or is in custody :—

Forgery, or uttering forged notes (*u*).

Bigamy (the second marriage being the offence) (*v*).

Larceny or embezzlement by persons in the public service, or the police (*w*).

Offences relating to the Post Office: (if committed upon a mail, or person conveying letters, or in respect of a post-letter, chattel, money, &c., sent by post, the venue may be either as above, or any county through any part of which the mail, person, letter, chattel, &c., has passed in due course of conveyance by post) (*x*).

iii. Either where the offence was committed, or in any adjoining county :—

In county of
crime or
adjoining
county.

Plundering a wrecked ship (*y*).

Where the offence was committed within the county of a city or town corporate (except London, Westminster, or Southwark), *e.g.*, Berwick, Newcastle, Bristol, Chester, Exeter, and Hull, it may be tried in the next adjoining county (*z*).

Where a felony or misdemeanor is committed on the boundary of two or more counties, or within five hundred yards of the boundary, or is begun in one county and completed in another, the venue may be laid in either county (*a*).

(*u*) 24 & 25 Vict. c. 98, s. 41.

(*v*) Ibid. c. 100, s. 57.

(*w*) Ibid. c. 96, s. 70.

(*x*) 7 Wm. 4 & 1 Vict. c. 36, s. 37.

(*y*) 24 & 25 Vict. c. 96, s. 64.

(*z*) 38 Geo. 3, c. 52; 51 Geo. 3, c. 100; 14 & 15 Vict. c. 55, ss. 19, 21, 23, 24; c. 100, s. 23.

(*a*) 7 Geo. 4, c. 64, s. 12.

County in which defendant is or is brought.

iv. Where the offender is or is brought :—

Offences against the customs on the high seas, the offender coming to land (*b*).

Forcing on shore, or leaving behind in any place out of the Queen's dominions any of the crew (*c*).

Where the offence was committed partly in one county, partly in another.

v. In either county, where the offence was committed partly in one, partly in another :—

Uttering counterfeit coin in one county and within ten days uttering in another ; or two persons acting in concert in two or more counties (*d*).

Larceny, simple or compound, is committed in one county and the thief carries the goods into another ; he may be indicted for the simple or compound larceny in the county where he committed it ; or as for simple larceny in the county into which, or in any of the counties through which, he carried the goods (*e*).

Conspiracy, &c., where acts are done in furtherance of the design in different counties.

Libels, threatening letters, challenges, &c., either in the county from which sent, or where received.

And, generally, where the offence is begun in one county and completed in another, the venue may be laid in either county (*f*).

Offences committed on journeys by land or water.

vi. In felonies or misdemeanors committed upon any person, or on, or in respect of any property, in or upon any coach, cart, or other carriage employed in any journey, or any vessel employed in river, canal, or inland navigation, the venue may be laid in any county

(*b*) 16 & 17 Vict. c. 107, s. 275.

(*c*) 17 & 18 Vict. c. 104, ss. 207, 520.

(*d*) 24 & 25 Vict. c. 99, s. 28.

(*e*) Ibid. c. 96, s. 114 ; v. Arch. 36.

(*f*) 7 Geo. 4, c. 64, s. 12.

through which the coach, or through which or between which the vessel passed in the journey (*g*).

vii. Receivers of stolen property, whether charged as accessories after the fact, or with a substantive felony, or with a misdemeanor only, may be tried in the county in which they have or had the property in their possession, or in which the principal may be tried (*h*). Receivers,
where tried.

viii. In the case of felonies wholly committed within England or Ireland, accessories before the fact (who, however, may now be tried in *all* respects as if principal felons (*i*)), and accessories after the fact, may be tried (a) by any court which has jurisdiction to try the principal; or (b) in any county in which the act by reason of which such person is an accessory has been committed. In other cases (*i.e.*, when not wholly committed within England or Ireland), by any court having jurisdiction to try the principal felony or any felonies committed in any county in which the accessory is apprehended or in custody (*j*). Accessories,
where tried.

ix. Where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England and Ireland, dies in England or Ireland, or *vice versa*, the offence may be dealt with in any county in England or Ireland in which the death, or the stroke, poisoning, or hurt happened (*k*). Blow, &c.,
followed by
death.

x. In indictments for being at large before the expiration of a sentence of transportation or penal servitude, the venue may be laid either in the county where the defendant is apprehended, or in that from which he was ordered to be transported, &c. (*l*). Returning
from trans-
portation, &c.

(*g*) 7 Geo. 4, c. 64, s. 13.

(*h*) 24 & 25 Vict. c. 96, s. 96.

(*i*) v. p. 37.

(*j*) 24 & 25 Vict. c. 94, s. 7.

(*k*) Ibid. c. 100, s. 10.

(*l*) 5 Geo. 4, c. 84, s. 22; 20 & 21 Vict. c. 3, s. 3.

Offences committed abroad.

xi. As to offences committed abroad :—

Where treason or misprision of treason is committed out of the realm (*i.e.*, out of the United Kingdom of Great Britain and Ireland), the venue may be laid in Middlesex, if the trial is to be in the Queen's Bench Division, or in such county as the Queen names, if she appoints a commission to try the offence (*m*).

When a subject of the Queen commits homicide on *land* out of the United Kingdom, he is tried in any county in England or Ireland where he is apprehended or is in custody (*n*).

For offences committed on the high seas and other places within the jurisdiction of the Admiralty (*o*), the offender may be tried in any county where he is in custody; the place of custody being the prison to which the committing justice or justices would have committed the offender for an offence on land within his or their jurisdiction (*p*); or if the crime is an indictable offence mentioned in one of the Consolidated Acts, also where he is apprehended (*q*).

C. C. C.

In the case of indictments preferred at the Central Criminal Court, the district within its jurisdiction (*r*) is to be deemed as one county, and the venue is "Central Criminal Court, to wit." Offences committed in detached parts of counties may be dealt with as if committed in the county wholly or in part surrounding (*s*).

Detached
parts of
counties.

(*m*) 35 Hen. 8, c. 2, s. 1.

(*n*) 24 & 25 Vict. c. 100, s. 9.

(*o*) As to jurisdiction of the Admiralty, &c., v. p. 305.

(*p*) 7 Geo. 4, c. 38; 7 Vict. c. 2, s. 3.

(*q*) v. 7 Geo. 4, c. 64, s. 27; 7 & 8 Vict. c. 2; 18 & 19 Vict. c. 91, s. 21; 30 & 31 Vict. c. 124, s. 11; 24 & 25 Vict. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; c. 100, s. 68.

(*r*) v. p. 306.

(*s*) 2 & 3 Vict. c. 82, s. 1.

CHAPTER VII.

THE GRAND JURY.

THE bill of indictment (as yet it is only a "bill," and is not correctly termed an indictment until found true by the grand jury) having been drawn up, the next step is to submit it to the grand jury.

Who are the grand jury? The sheriff of every county is required to return to every sessions of the peace, and every commission of oyer and terminer, and of gaol delivery, twenty-four good and loyal men of the county "to inquire into, present, do and execute all those things which, on the part of our Lady the Queen, shall then be commanded them." Grand jurors at the assizes, or at the borough sessions (at the latter they must be burgesses, 5 & 6 Wm. 4, c. 76, s. 121), do not require any qualification by estate; at the county sessions they must have the qualification required of petty jurors (*t*). At the assizes, the grand jury generally consists of gentlemen of the highest position in the county.

After the court has been opened in the usual way by the crier making proclamation, the names of those summoned on the grand jury are called. As many as appear upon this panel are sworn. They must number twelve at least, but not more than twenty-three, so that twelve may be a majority. The usual proclamation against vice and profaneness is read; and then the person presiding in the court—the judge at the

The grand jury, how chosen.

The grand jury sworn and charged.

assizes, the chairman at the county sessions, the recorder at the borough sessions—charges the grand jury. The object of this charge is to assist the grand jury in coming to a right conclusion, by directing their attention to points which require special attention. He explains the force of any recent enactments, or any not frequently applied, which bear upon the matters laid before them. He also draws their attention, if necessary, to crimes which are liable to be confused, for example, larceny and embezzlement; and in general directs their inquiries to the proper channel.

Examination
of witnesses
by the grand
jury.

The charge having been delivered, the grand jury withdraw to their own room, having received the bills of indictment. The witnesses whose names are indorsed on the bill are sworn as they come to be examined in the grand jury room; the oath being administered by the foreman, who, as each witness is examined, writes his initials opposite to the name on the back of the bill (*u*). Only the witnesses for the prosecution are examined, seeing that the function of the grand jury is merely to inquire whether there is sufficient ground to put the accused on his trial. If the majority of them think that the evidence adduced makes out a sufficient case, the words "a true bill" are indorsed on the back of the bill; if they are of the opposite opinion, the words "not a true bill" are so indorsed, and in this case the bill is said to be ignored. They may find a true bill as to the charge in one count, and ignore that in another; or as to one defendant and not as to another; but they cannot, like a petty jury, return a special or conditional finding, or select parts of the counts as true and reject the rest. When one or more bills are found, the grand jury come into court and hand the bills to the clerk of arraigns, or clerk of the peace, who states to the court the name of the prisoner, the charge, and the indorsement of the

The finding of
the grand jury.

(u) 19 & 20 Vict. c. 54, s. 1.

grand jury. They then retire and consider other bills, until all are disposed of; after which they are discharged by judge, chairman, or recorder, presiding.

If the bill is thrown out or "cut," although it cannot again be preferred to the grand jury during the same assizes or sessions, it may be preferred and found at subsequent assizes or sessions, of course within the time limited, if there be any time so limited (v). We may anticipate, by reminding the reader that this cannot be done in respect of the same offence if the petty jury have returned a verdict; unless, indeed, the prisoner is acquitted, on a charge of felony, merely on the ground that the proof establishes an act short of the felony charged, but which amounts to a misdemeanor, or another kind of felony. In such case the court orders him to be detained; and the proper course is to take him before the magistrate again.

We have pursued the ordinary method of criminal procedure by supposing that, in the first instance, there has been an examination before the magistrate. But this does not always take place. With certain exceptions, a person may prefer a bill of indictment against another before the grand jury without any previous inquiry into the truth of the accusation before a magistrate. This general right was, at one time, an universal right, and was often the engine of tyranny and abuse. It is easy to conceive how an innocent man's character might be injured, or at least how he might be put to great expense and inconvenience in defending himself against a charge founded on a true bill returned by the grand jury, who have heard only the evidence for the prosecution. A substantial check was put upon this grievance by the Vexatious Indictments Act (w). It provides that no bill of indictment

Consequences
of the bill
being thrown
out.

Bills preferred
without
previous
examination
before a
magistrate.

Vexatious
Indictments
Act.

(v) Arch. 84. v. p. 345.
(w) 22 & 23 Vict. c. 17.

Offences dealt
with in this
Act.

for any of the offences enumerated below shall be presented to or found by a grand jury unless one of the following steps has been taken:—(a) The prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the accused; or (b) the accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer an indictment for such offence (x); or (c) unless the indictment has been preferred by the direction, or with the consent in writing, of a judge of the High Court, or the Attorney or Solicitor-General of England, if the offence has been committed in England; or of a judge of one of the superior courts of law in Dublin, or the Attorney or Solicitor-General of Ireland, if the offence has been committed in Ireland; or (d) in case of an indictment for perjury, by the direction of any court, judge, or public functionary, authorized by 14 & 15 Vict. c. 100, to direct a prosecution for perjury. The offences referred to are:—Perjury, subornation of perjury, conspiracy, obtaining money or property by false pretences, keeping a gambling house, keeping a disorderly house, indecent assault; and now, by the Debtors Act, 1869 (y), any misdemeanor under the second part of that Act. The object of this salutary provision was furthered by a subsequent statute (z), one section of which (sect. 2) allows the court trying an indictment for any of such offences, in its discretion, to order the prosecutor to pay costs and expenses to the accused in the event of the latter's acquittal.

(x) See s. 2 as to a justice refusing to commit or bail.

(y) 32 & 33 Vict. c. 62, s. 18.

(z) 30 & 31 Vict. c. 35.

CHAPTER VIII.

PROCESS.

THE grand jury have found a true bill. The next point Process, to be considered is the process (the writs or judicial means) issued, or made to *proceed*, to compel the attendance of the accused to answer the charge. Of course this is not required if he is in custody or surrenders to his bail; in such case he may be tried as soon as is convenient. If he is in custody of another court for some other offence, the course is to remove him by a writ of *habeas corpus*, and bring him up to plead. But if he is already in the custody of the same court, there is no need for such writ (*a*).

If, however, an indictment has been found in the when it issues. absence of the accused, he having fled or secreted himself so as to avoid the warrant of arrest, or has not been bound over to appear at the assizes or sessions, then process must issue to bring him into court. It is contrary to the policy and humanity of the English law to try an indictment in the absence of the accused (*b*).

Process in ordinary cases is now regulated by 11 & Warrant issued by a magistrate. 12 Vict. c. 42, s. 3. When an indictment has been found at the assizes or sessions against some person who is at large, the clerk of indictments, or clerk of the peace, after such assizes or sessions, upon the application of the prosecutor or any person on his

(*a*) 30 & 31 Vict. c. 35, s. 10.

(*b*) But v. p. 372.

behalf, will grant a certificate of such indictment having been found. Upon production of this certificate to any justice of the jurisdiction where the offence is alleged to have been committed, or in which the accused resides, or is, or is suspected of residing or being, such justice may and must issue his warrant to apprehend the person so indicted and bring him before some justice of the jurisdiction, who, upon proof by oath that the person present is the person indicted, will, without further inquiry or examination, commit him for trial or admit him to bail (c). Provision is also made for the backing of such warrant if the accused is out of the above jurisdiction (d). If he is already in prison, the justice must issue his warrant to the gaoler, ordering him to detain him until removed by *habeas corpus* or otherwise in due course of law (e).

Bench warrant. Another mode of proceeding is, for the court before whom the indictment is found to issue a *bench warrant* for the arrest of the accused, and to bring him immediately before such court. At the assizes it is signed by the judge, at sessions by two justices of the peace. Any judge of the Queen's Bench Division, upon affidavit or certificate that an indictment has been found, or information filed in that court, may issue his warrant for apprehending and holding the accused to bail; and in default of bail he may commit him to prison (f).

Process in other cases.

In cases not provided for as above, the following are the steps. In *misdemeanors*, when the indictment is found, a writ of *venire facias ad respondendum* (which may be issued by the Queen's Bench Division, a judge of assize, or a court of quarter sessions) is issued, its

(c) 11 & 12 Vict. c. 42, s. 3.

(d) *Ibid.* s. 11.

(e) *Ibid.* s. 3.

(f) 48 Geo. 3, c. 58, s. 1.

nature being a summons to cause the party to appear. If he makes default in appearing to answer to this writ, a writ of *distringas* may be issued from time to time. If he still fails to appear, and the sheriff makes return that he has no lands, a writ of *capias ad respondendum*, commanding the sheriff to take his body to answer the charge, may be issued; and if he is not taken upon the first *capias*, a second and a third, termed an *alias* and a *pluries*, may issue. Upon an indictment for felony a *capias* may issue in the first instance.

If none of these modes of summary process are effectual, the accused is liable to *outlawry*, the consequences differing according as the charge is one of misdemeanor or of felony.

First, in the case of *misdemeanors*.—The proceedings are by *venire facias*, *distringas*, *capias*, *alias capias pluries capias*, as above. If none of these measures accomplish their object, a writ of *exigent* is awarded, by which the sheriff is required to proclaim or exact the defendant, and call him five successive county court days, charging him to appear upon pain of outlawry. The defendant still not appearing on the fifth county court day, judgment of outlawry is pronounced by one of the coroners for the county. The judgment of outlawry in misdemeanors operates as a conviction of the contempt for not answering (g).

In *felonies* (including treason) the proceedings are more summary, though they are followed by graver consequences. The first process is a *capias*, and the other proceedings ensue as above. The outlawry amounts to a conviction or attainder of the offence charged in the indictment, as if the defendant had been found guilty by a jury. Formerly, an outlawed

felon was considered as literally out of the pale of the law, and might be killed by any one; but now, of course, it would be murder, unless the killing were caused in an endeavour to apprehend him. Any one may arrest an outlaw on a criminal prosecution, either of his own head, or by writ or warrant of *capias utlagatum*, in order to give him up to the law (*h*).

Consequences
of outlawry.

The general consequences of outlawry, both in felonies and misdemeanors, are the following:—The person outlawed is *civiliter mortuus*. His goods are forfeited from the *exigent*, his lands from the outlawry, and the Act abolishing forfeiture in general does not interfere with this (*i*). He cannot hold property given or left to him. He cannot sue on his own contract, nor can he sue for the redress of any injury. He may be a witness, but cannot be a juror (*j*).

Reversal of
outlawry.

As to the *reversal* of the outlawry.—If there has been any mistake or omission in the proceedings, or for other cause—for example, if the defendant was in prison—the accused may have the benefit of this. In cases of felony he must render himself into custody and pay the allowance of the writ of error in person; if it be reversed, he must still meet the indictment. In other cases he may appear by attorney (*k*).

Process on
informations.

Process on informations is similar to that on indictments. But the first process is by writ of *subpœna*, instead of *venire*; and then, if this is not effectual, a *capias*. But if it is necessary to proceed to outlawry, the first process is by *venire facias* (as in an indictment for misdemeanor), and not by *subpœna* (*l*).

(*h*) 4 Bl. 319.

(*i*) 33 & 34 Vict. c. 23, s. 1.

(*j*) v. Bac. Abr.

(*k*) 4 & 5 Wm. 3, c. 18. v. *Solomon v. Graham*, 5 Ell. & Bl. 320.

(*l*) v. 1 Chit. Cr. L. 865.

The appearance of the accused having been enforced in this way, or voluntarily made, the next step is to arraign him. But we must first treat of an exceptional proceeding, which sometimes at this stage intervenes to remove the proceedings to a higher court.

CHAPTER IX.

CERTIORARI.

Certiorari.

WE have already ascertained where the trial of an offence will, in the regular course of things, take place. But any criminal proceeding may be removed by a writ of *certiorari* into the Queen's Bench Division, the supreme court of criminal jurisdiction. This writ is directed to the inferior court, requiring it to return the records of an indictment or inquisition depending before it, so that the party may have a trial in the Queen's Bench Division, or before such justices as the Queen shall assign to hear and determine the cause. The result is, that the jurisdiction of the inferior court is superseded; all proceedings there are illegal, unless the Queen's Bench remands the record back to the inferior court for trial. The proper time to apply for this writ is before issue is joined on the indictment, or at least before the jury are sworn; but it has been allowed at any time before judgment, and even afterwards, when error does not lie. But applications at such a stage are discouraged, and special cause must be shewn (*m*).

When the writ
should be
applied for.

In what cases
granted.

In what cases is it granted? It is demandable as of right by the Crown, and issues as of course when the Attorney-General or other officer of the Crown applies for it, either as prosecutor or as conducting the defence on behalf of the Crown (*n*). Formerly, it was granted almost of course to private prosecutors; but

(*m*) 2 Hawk. c. 27, s. 28. v. *R. v. Garride*, 2 A. & E. 266.

(*n*) *R. v. Eaton*, 2 T. R. 89.

now by them, as by defendants, leave must be applied for, and this may be refused (*o*). It is also provided that no indictment (except indictments against bodies corporate not authorized to appear by attorney in the court in which the indictment is preferred) shall be removed into the Queen's Bench Division or Central Criminal Court by writ of *certiorari*, either at the instance of prosecutor or of defendant (except the Attorney-General on behalf of the Crown) unless it be made to appear to the court from which the writ is to issue, by the party applying the same (a) that a fair and impartial trial of the case cannot be had in the court below; or (b) that some question of law of more than usual difficulty and importance is likely to arise upon the trial; or (c) that it may be necessary to have a view of the premises in respect whereof the indictment is preferred; or (d) that a special jury may be required to insure a satisfactory trial (*p*). But, among other cases, an application by the defendant will not be granted for the removal of an indictment for perjury, forgery, or other heinous misdemeanors when the delay tends to defeat the prosecution (*q*), nor for murder (*r*). Nor in general will it be removed from a court of competent jurisdiction where one of the judges presides, except by consent of the prosecutor (*s*).

The mode of obtaining the writ is the following:—
 The application must be founded on an affidavit suggesting adequate ground for the removal. Motion must be made in court, or to a judge in chambers, and leave obtained, and this whether the application is made on the part of the prosecution or of the defence (*t*). When it is granted at the instance of the defendant,

Mode of
obtaining the
writ.

(*o*) 5 & 6 Wm. 4, c. 33.
 (*p*) 16 & 17 Vict. c. 30, s. 4.
 (*q*) 2 Hawk. c. 27, s. 28.
 (*r*) *R. v. Mead*, 3 D. & R. 301.
 (*s*) Arch. 104.
 (*t*) 5 & 6 Wm. 4, c. 33, s. 1.

Costs.

the amount of recognizance to be entered into before a judge of the Queen's Bench Division, or a justice of the jurisdiction where the defendant resides, by the defendant and his bail, is ordered by the court and indorsed on the writ (*u*). Moreover, when at the instance of the defendant, this recognizance must contain the further provision that the defendant, if convicted, will pay to the prosecutor his costs incurred subsequent to the removal of the indictment; and when at the instance of the prosecutor, he must enter into a recognizance with the condition that he will pay the defendant, if acquitted, the costs incurred subsequent to such removal (*v*). And if such recognizance be not entered into by the parties at whose instance the *certiorari* is awarded, the court proceeds to trial as if the writ had not been awarded (*w*). It is after this recognizance has been lodged with the clerk of assize or clerk of the peace that all proceedings in the court below are erroneous.

Trial at
C. C. C.

Provision is made by statute (*x*) for the trial at the Central Criminal Court of indictments or inquisitions for felonies or misdemeanors committed out of the jurisdiction of the Central Criminal Court, which have been removed by *certiorari* into the Queen's Bench Division; and for the removal of such indictment or inquisition by order of the Queen's Bench Division directly into the Central Criminal Court from an inferior court.

(*u*) 5 & 6 Wm. & M. c. 11; 5 & 6 Wm. 4, c. 33.

(*v*) 16 & 17 Vict. c. 30, s. 5.

(*w*) Ibid. s. 7.

(*x*) 19 & 20 Vict. c. 16, ss. 1, 3.

CHAPTER X.

TIME OF TRIAL, ETC.

A TRUE bill has been found against the defendant, and ^{Time of trial} his attendance has been secured by one of the means indicated above. When will he take his trial at the hands of the petty jury ?

Indictments for *felony* are tried at the same assizes in felonies, or sessions at which they are found by the grand jury. The trial may, however, be postponed to the next assizes or sessions, on the application of either the prosecutor or the defendant. But he must satisfy the court by affidavit that there is sufficient cause for the postponement, such as the illness or unavoidable absence of a material witness. The defendant will be detained in custody till the trial, or admitted to bail ; or, if the application for postponement is made by the prosecution, the defendant may be discharged on his own recognizances (y).

In *misdemeanors*, formerly when the defendant was ^{in misde-} not in custody, it was the practice not to try him at ^{meanors.} the same assizes or sessions at which he pleaded not guilty to the indictment, but to require him to give security to appear at the next assizes or sessions. But now it is provided generally that,—No person prosecuted is entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or of gaol delivery ; provided always, that if the court, upon the application

(y) *R. v. Beardmore*, 7 C. & P. 497.

of the person so indicted or otherwise, be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn his trial to the next subsequent session, upon such terms as to bail or otherwise as seem proper to the court, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses are bound to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose (z).

Order of trial. As to the order of trial of prisoners at the same assizes or sessions, the indictments found are filed by the clerk of arraigns or clerk of the peace in the order in which they are received from the grand jury. And, roughly speaking, this is the order of trial, felonies, as a rule, being taken before misdemeanors, and cases in which the defendant is in custody before bail cases. But this arrangement is subject to the discretion of the judge, who constantly sets it aside to suit the convenience of counsel, and for other purposes.

ARRAIGNMENT (a).

Arraignment. The arraignment, or requiring the prisoner to answer to the charge of an indictable offence, consists of three parts:—

- (a.) Calling the prisoner to the bar by name.
- (b.) Reading the indictment to him.
- (c.) Asking him whether he is guilty or not of the offence charged.

The former practice of requiring him to hold up his hand for the purpose of identification is now generally

(z) 14 & 15 Vict. c. 100, s. 27.

(a) *Ad rationem—ad rem—à rem.*

disused, unless it be adopted in order to distinguish between two or more prisoners who are being arraigned at the same time. Nor is the prisoner now asked how he will be tried, it being taken for granted that he will be tried by a jury. He is to be brought to the bar without irons, or any manner of shackles or bonds, unless there is evident danger of escape. In felonies he must be placed at the bar of the court, though in misdemeanors this does not seem necessary (*b*). If several defendants are charged in the same indictment, they ought all to be arraigned at the same time. It is usual, for convenience' sake, to arraign several prisoners immediately in succession, and then to proceed to the trial of one, the rest being put down for the time.

The indictment having been read to the prisoner, ^{Taking the} the clerk of arraigns, or clerk of the peace, or other ^{plea.} proper officer of the court, demands of him, "How say you, John Styles, are you guilty or not guilty?" One of three courses will then be taken by the prisoner. He will either

(a.) Stand mute. (b.) Confess, or say that he is guilty. (c.) Plead.

Standing mute, that is, not answering at all, or ^{Standing} answering irrelevantly. In former times, if, in cases ^{mute.} of felony, this standing mute was obstinate, the sentence of *peine forte et dure* followed (*c*); in treason and misdemeanor the standing mute was equal to a conviction. Later, in every case it had the force of a conviction (*d*). If the prisoner was dumb *ex visitatione Dei*, the trial proceeded as if he had pleaded not guilty. But now, if the prisoner stands mute of malice, or will not answer directly to the indictment or information, the court

(b) *R. v. Lovett*, 9 C. & P. 462.

(c) *v. Reeves's Hist. of Eng. Law*, ii. 134, iii. 133, 250, 418.

(d) 12 Geo. 3, c. 20.

may order the proper officer to enter a plea of not guilty on behalf of such person; and the plea so entered has the same force and effect as if the person had actually so pleaded (e). If it is doubtful whether the muteness be of malice or *ex visitatione Dei*, a jury of any twelve persons present may be sworn to discover this. If they find him mute of malice, 7 & 8 Geo. 4, c. 28, will apply; if mute *ex visitatione Dei*, the court will use such means as may be sufficient to enable him to understand the charge and make his answer; or if this be found impracticable, a plea of not guilty will be entered, and the trial proceed.

Doubt as to
sanity of
prisoner at
time of
arraignment.

In the event of a doubt arising as to the sanity of a prisoner at the time of his arraignment, a jury will be sworn to ascertain the state of his mind. If they find him insane, so that he cannot be tried on the indictment, it is lawful for the court before whom he is brought to be arraigned to direct such finding to be recorded; and thereupon to order such person to be kept in strict custody until Her Majesty's pleasure be known. If he does not seem able to distinguish between a plea of guilty and not guilty, this is enough to justify the jury in finding him of unsound mind. So also if he has not sufficient intellect to comprehend the nature or course of proceedings, so as to make a proper defence, and challenge jurors, and the like (f). It will be remembered that although the prisoner was sane when the crime was committed, if he appears to be insane at the time of arraignment (or indeed at any subsequent period), the trial will be deferred until he has recovered his reason (g).

Presence of
accused at the
trial.

We may notice here that no trial for felony can be

(e) 7 & 8 Geo. 4, c. 28, s. 2.

(f) *R. v. Pritchard*, 7 C. & P. 303; *R. v. Berry*, L. R. 1 Q. B. 447; 45 L. J. (M.C.) 123.

(g) v. 40 Geo. 3, c. 94, s. 2. Insanity at the time of the commission of the crime is quite another consideration, and is treated of elsewhere. v. p. 20.

had except in the presence of the prisoner. But in cases of misdemeanor, after the defendant has pleaded, the trial may go on, though he is not present. Thus, in a recent case of perjury, when the defendant took ill, the trial proceeded during his temporary absence (*h*). In indictments or informations for misdemeanor in the Queen's Bench, the accused may appear by attorney.

CONFESSION.

If the accused makes a simple, unqualified confession that he is guilty of the offence charged in the indictment, if he adheres to this confession, the court has nothing to do but to award judgment, generally hearing the facts of the case from the prosecuting counsel. But the court usually shews reluctance to accept and record such confession in cases involving capital or other great punishment; often it advises the prisoner to retract the confession and plead to the indictment. The reason of this is obvious, the defendant may not fully understand the nature of the charge, he may be actuated by a morbid desire for punishment, &c. When the prisoner has pleaded guilty, and sentence has been passed, he cannot retract his plea and plead not guilty (*i*). On the other hand, a prisoner who has pleaded not guilty may, by leave of the court, on the advice of his counsel or otherwise, withdraw that plea and plead guilty (*j*).

Confession, or
answer of
"Guilty."

A free and voluntary confession by the defendant before the magistrate, if duly made and satisfactorily proved, is sufficient to warrant a conviction without further corroboration; but, of course, the whole of the confession must be taken into account, the part favourable to the prisoner as well as that against him. This confession, as also any free or voluntary confession

Confession
before the
magistrate is
merely
evidence.

(*h*) *R. v. Castro*, L. R. 5 Q. B. D. 490.

(*i*) *R. v. Sell*, 9 C. & P. 346.

(*j*) *v. R. v. Brown*, 17 L. J. (M.C.) 145.

made to any other person, is merely evidence (though if undisputed no other evidence may be needed); and is to be widely distinguished from the confession in court or plea of guilty.

Queen's
evidence.

In connection with this subject we must advert to the case of one of several co-defendants turning *Queen's evidence*. When sufficient evidence of a felony cannot be obtained from other quarters, and when it is perceived that the testimony of one of the accused would supply this defect, it is usual for the committing magistrate to hold out hope to this one that if he will give evidence so as to bring the others to justice, he himself will escape punishment. The approval of the presiding judge will have to be obtained (*k*). Even during the trial it sometimes happens that the counsel for the prosecution, with the consent of the court, when such a course is necessary to secure a conviction, takes one of the defendants out of the dock and puts him in the witness-box; such prisoner, of course, obtaining a verdict of acquittal (*l*). But, as we shall see hereafter more fully, the evidence of an accomplice is to be regarded with suspicion, and requires corroboration (*m*).

(*k*) *R. v. Rudd*, 1 Leach, 115.

(*l*) *R. v. Rowland*, Ry. & M. 401.

(*m*) v. p. 412.

CHAPTER XI.

PLEAS.

If the defendant neither stands mute nor confesses, he Pleas. pleads, that is, he alleges some defensive matter. The learning on the subject of the different pleas has become to a great extent a matter of history rather than of practice, on account of the comprehensive character of the plea of the general issue of not guilty, and also on account of the right to move in arrest of judgment. The following are the names of the pleas in the order Their order. in which they should be pleaded :—

- | | |
|----------------------------------|---------------------------------------|
| i. Plea to the jurisdiction, | } termed " <i>dilatory</i>
pleas." |
| ii. Plea in abatement, | |
| iii. Special pleas in bar, | |
| (a.) Autrefois acquit. | |
| (b.) Autrefois convict. | |
| (c.) Autrefois attain. | |
| (d.) Pardon. | |
| iv. General issue of not guilty. | |

Each of these will be considered separately. In the next chapter *demurrers* will be noticed. These Blackstone treats as pleas, whereas in truth they are rather in the nature of objections that there is not sufficient case in point of law to oblige the accused to plead.

It is not to be understood that a defendant may in turn go through the whole of these pleas, resorting to How many pleas may be resorted to.

the subsequent plea as a previous one fails. The rule is that not more than one plea can be pleaded to an indictment for misdemeanor, or a criminal information. In felonies if the accused pleads in abatement, he may afterwards, if the plea is adjudged against him, plead over to the felony, that is, plead the general issue of not guilty.

Plea to the jurisdiction.

i. *Plea to the jurisdiction.*—When an indictment is taken before a court which has no cognizance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged. This want of jurisdiction may arise either from the fact that the offence was not committed within the district of the jurisdiction, for example, if a person be indicted in Kent for stabbing a person in Sussex; or because the tribunal in question has not cognizance of that class of crimes, for example, if a person be indicted at the sessions for murder.

Why seldom pleaded.

But this plea is very seldom resorted to, inasmuch as relief can be obtained in other ways. Thus the objection that the offence was committed out of the jurisdiction may generally be urged under the general issue, or, in certain cases, by demurrer, or by moving in arrest of judgment, or by writ of error. If the objection is that the crime is not cognizable in a court of that grade, though committed within the jurisdiction, the defendant may demur, or have advantage of it under the general issue, or by removing the indictment to the Queen's Bench Division and there quashing it.

The clerk of the peace or of the arraigns may make *replication*, shewing that the offence is triable by the court. And to this the defendant may rejoin (*n*).

(*n*) This pleading is done out of court, and must be distinguished from the objections taken under the general issue by the prisoner in court.

ii. *Plea in abatement*.—This is another dilatory plea, Plea in abatement. formerly principally used in the case of the defendant being misnamed in the indictment; for example, if a wrong Christian name or addition were given. But even if the defendant was successful on this plea, a new bill of indictment with the correction might at once be framed. The plea is now, however, virtually obsolete. It has been enacted that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition, if the court be satisfied of the truth of the plea. The court will cause the indictment or information to be amended, and will call upon the party to plead thereto, and will proceed as if no such dilatory plea had been pleaded (*o*). And no indictment is to be held insufficient for want of, or imperfection in, the addition of any defendant (*p*).

iii. *Special pleas in bar*.—These are termed “special” Special pleas in bar. to distinguish them from the general issue; and “in bar” because they shew reason why the defendant ought not to answer at all, nor put himself upon his trial for the crime alleged, and thus they are distinguished from dilatory pleas which merely postpone the result.

All matters of excuse and justification may be given in evidence under the general issue; therefore it is hardly ever necessary to resort to a special plea in bar, except in the four cases to be examined more in detail (*q*).

If judgment on a special plea in bar is given against Judgment on such special pleas.

(*o*) 7 Geo. 4, c. 64, s. 19.

(*p*) 14 & 15 Vict. c. 100, s. 24. We have already adverted to the large powers of amendment which are given to the court by this statute.

(*q*) “In fact, the only instance in which a special plea in bar seems requisite in criminal cases is, where a parish or county is indicted for not repairing a road or bridge, &c., and wishes to throw the onus of repairing upon some person or persons not bound of common right to repair it.”—Arch. 140.

the defendant in a felony, it is to the effect that he make further answer (*respondeat ouster*); but as he generally pleads at the same time the general issue, when such judgment is given against him the jury proceed to inquire into his guilt, as if the special plea had not been pleaded. If the plea is established in his favour, he is discharged. In misdemeanors the judgment is final, so that if it is against the defendant he is considered guilty of the offence; if for him, he is discharged.

Plea of *autrefois acquit*.

(a.) *Autrefois acquit*.—When a person has been indicted for an offence and regularly acquitted, he cannot afterwards be indicted for the same offence, provided that the indictment were such that he could have been lawfully convicted on it. It is against the policy of the English law that a man should be put in peril more than once for the same offence. And therefore if he is indicted a second time, he may plead *autrefois acquit*, and thus bar the indictment. It is frequently a difficult matter to determine whether the second indictment bears such a relation to the first, that the latter is a bar to the former. The true test seems to be this—whether the facts charged in the second indictment would, if true, have sustained the first (r). An acquittal for murder may be pleaded in bar of an indictment for manslaughter, and *vice versa*. So with larceny and embezzlement; robbery, and assault with intent to rob; felony, and an attempt to commit the felony. But an acquittal for larceny is no bar to an indictment for false pretences; nor will an acquittal as accessory bar an indictment as principal, and *vice versa*. Nor, again, is an acquittal on a charge of stealing “certain goods” on the ground that such goods are a fixture in a building, a bar to an indictment for stealing the fixture (s).

(r) *R. v. Vandercomb*, 2 Leach, 708.

(s) *R. v. O'Brien*, 46 L. T. N. S. 177.

The prisoner must satisfy the court first, that the former indictment on which an acquittal took place was sufficient in point of law, so that he was in jeopardy upon it; secondly, that in the indictment the same offence was charged, for the indictment is in such a form as to apply equally to several different offences (*t*). To prove his acquittal he may obtain a certificate thereof from the officer or his deputy having custody of the records of the court where the acquittal took place (*u*).

What acquittal must be proved.

(b.) *Autrefois convict*.—A former conviction may be pleaded in bar of a subsequent indictment for the same offence; and this, whether judgment were given or not. The same rules as in the plea of *autrefois acquit* generally apply; thus there is the same test as to the identity of the crime (*v*).

Plea of autrefois convict.

(c.) *Autrefois attain*.—Formerly when a person was attainted, as long as the attainder was in force he was considered legally dead. Therefore a plea of an already existing attainder was a bar to a subsequent indictment for the same or for any other felony, on the ground that such second prosecution of a person already dead, and whose property had been forfeited, would be useless. But now an attainder is no bar unless the attainder be for the same offence as that charged in the indictment (*x*), so that practically the plea of *autrefois attain* is a thing of the past.

Plea of autrefois attain.

(d.) *Pardon*.—A pardon may be pleaded not only in

Pardon.

(*t*) Parke, B., in *R. v. Bird*, 2 Den. 94, 98.

(*u*) 14 & 15 Vict. c. 99, s. 13.

(*v*) The reader should refer to the chapter on Summary Conviction, p. 478; where he will meet with defences similar to these pleas of *autrefois acquit* and *autrefois convict*, namely, a certificate of dismissal, or proof of having submitted to punishment, in cases of assault and battery under 24 & 25 Vict. c. 100, ss. 44, 45. So also as to dismissal or conviction under the Summary Jurisdiction Act, v. 42 & 43 Vict. c. 49, s. 27; post, p. 478.

(*x*) 7 & 8 Geo. 4, c. 28, s. 4.

bar to the indictment (as in the case of the three pleas just noticed), but also after verdict in arrest of judgment; or, after judgment, in bar of execution. But it must be pleaded as soon as the defendant has an opportunity of doing so; otherwise he will be considered to have waived the benefit of it. The subject will find a more convenient place hereafter (*y*).

The general issue.

iv. *The general issue of not guilty.*—When the prisoner, on being charged with the offence, answers *viâ voce* at the bar “Not guilty,” he is said to plead the general issue. The consequence is, that he is to be tried by a jury, or, as it is frequently stated, he puts himself upon the country for trial. The plea is recorded by the proper officer of the court, either by writing the words “*po. se.*” (*posuit se super patriam*), or at the Central Criminal Court by the word “*puts.*”

Advantages of pleading “Not Guilty.”

This is much the most common and advantageous course for the prisoner to take; unless, indeed, he pleads guilty, and thereby the court is induced to take a more lenient view of his case. Pleading the general issue does not necessarily imply that the prisoner contends that he did not do the actual deed in question, inasmuch as it does not prevent him from urging matter in excuse or justification. More, this is practically the only way in which he can urge matter in excuse or justification. Thus, on an indictment for murder, a man cannot plead that the killing was done in his own defence against a burglar; he must plead the general issue—not guilty—and give the special matter in evidence. The pleading of the general issue lays upon the prosecutor the task of proving every material fact alleged in the indictment or information; while the accused may give in evidence anything of a defensive character.

Issue.—When the prisoner has pleaded not guilty, *Issue.* the record is made up, both parties being brought to an issue, and both putting themselves upon their trial by jury. The general issue appears on the record: "*And the said John Styles forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, saith, that he is not guilty thereof.*" And on the part of the prosecution the *similiter* is then added: "*And John Brown (the clerk of the arraigns, or clerk of the peace), who prosecutes for our said Lady the Queen in this behalf, doth the like. Therefore let a jury come,*" &c. (2).

(2) For other ceremonies formerly observed, and the origin of the term "culprit," &c., v. 4 Bl. 339, or 4 St. Bl. 404, n.

CHAPTER XII.

DEMURRER.

Demurrer.

A DEMURRER is an objection on the part of the defendant who admits the facts alleged in the indictment to be true, but insists that they do not in point of law amount to the crime with which he is charged. Thus, if a person is indicted for *feloniously* stealing goods which are not the subject of larceny at common law or by statute, he may demur to the indictment, denying it to be a felony. It is for the court, on hearing the arguments, to decide whether the objection be good. The following is the form of a demurrer:—

“ And the said John Styles in his own proper person cometh into court here, and, having heard the said indictment (or information) read, saith, that the said indictment (or information) and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said J. S., is not bound by the law of the land to answer the same; and this he is ready to verify: wherefore, for want of a sufficient indictment (or information) in this behalf, the said J. S. prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment (or information) specified.”

Judgment on
demurrer.

If on the demurrer judgment is given *for* the defendant, it is to the effect that he be discharged, provided that the objection be a substantial one; that the indictment be quashed, if it is a merely formal one. If judgment is given *against* the defendant, in felonies the judgment is final; in misdemeanors it is final,

unless the court should afterwards permit the defendant to plead over (a).

Demurrers in criminal cases seldom occur in practice. Not only is there the risk of having final judgment against the defendant, but the same objections may be brought forward in other and safer ways. In cases of defects in substance apparent on the face of the indictment, generally the defendant may, instead of demurring, plead not guilty, and then, if convicted, move in arrest of judgment. Thus he has a double chance of getting off, first on the facts of the case, then on the point of law. But this course cannot be taken when the defect in the indictment is cured by verdict (b).

Demurrers,
why seldom
resorted to.

Formerly there was another kind of demurrer besides the general demurrer to which we have been referring, namely, a special demurrer, usually termed a "demurrer in abatement." This was founded on some formal defect in the indictment, whereas a general demurrer is founded on some substantial defect. But now no demurrer lies in respect of the defects specified in the 24th section of 14 & 15 Vict. c. 100 (c); and demurrers for other formal defects are practically rendered useless by sect. 25 of the same statute, which provides that every objection to an indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash the indictment before the jury are sworn, and not afterwards; and the court before which such objection is taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particulars, and thereupon the trial will proceed as if no such defect had appeared.

Demurrer in
abatement.

(a) This seems to be the state of the law as settled in *R. v. Faderman*, 1 Den. 569; 3 C. & K. 353; though some still contend that in felonies, after judgment against the defendant, he may still plead not guilty; and a defendant has been allowed to demur and plead not guilty at the same time.

(b) v. 7 Geo. 4, c. 64, s. 21. *Heymann v. R.*, L. R. 8 Q. B. 105. *R. v. Goldsmith*, L. R. 2 C. C. R. 74; 42 L. J. (M.C.) 94.

(c) v. p. 339.

TRIAL.

Obsolete forms
of trial.

It will not be necessary to describe the various modes of trial which have long been abolished, namely, the ordeal, the corsned, trial by battle (*d*). The last of these was suppressed by 59 Geo. 3, c. 46, in consequence of a case (*e*) in which the person accused demanded the settlement of the question by a fight.

The existing
forms.

The only modes of trial which now remain are:—

A. Trial of peers in the Court of Parliament or the Court of the Lord High Steward, of which enough has been said above.

B. Trial by jury (or by the country—*per patriam*)—the trial by his peers which every Englishman is entitled to claim (*f*). This of course is the ordinary mode of trial, both at the sessions, the assizes, the Central Criminal Court, and the Queen's Bench Division. It is this with which we have now to deal, taking the various steps in their order.

(*d*) A full account will be found in the various editions of Blackstone, Hallam's Middle Ages, Reeves's History of English Law, and the other works dealing with the history of the law.

(*e*) *Ashford v. Thornton*, 1 B. & Ald. 405.

(*f*) *Nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale iudicium parium suorum, vel per legem terre.*—Magna Charta.

CHAPTER XIII.

THE PETTY JURY.

WHEN the prisoner has put himself upon the country, the petty jurors are called by the clerk to answer to their names. The list which is thus called over is the panel returned by the sheriff.

Who are liable to serve on the petty jury, and how are they returned? The law on this subject is contained chiefly in two statutes, the Jury Act, 1826 (*g*), and the Juries Act, 1870 (*h*). The qualification of common jurors is the following:—Every man between the ages of twenty-one and sixty, residing in any county in England, who has in his own name, or in trust for him, within the same county, £10 by the year above reprises in lands or tenements, or in rents therefrom, or in such lands and rents taken together, in fee simple, fee tail, or for the life of himself or some other person—or lands to the value of £20 a year held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives; or who, being a householder, is rated or assessed to the poor-rate or to the inhabited house duty, in Middlesex to a value of not less than £30, or in any other county not less than £20; or who occupies a house containing not less than fifteen windows—is qualified to serve on petty juries at the courts at Westminster, in the counties palatine, and at the assizes, and also at both the grand and petty juries at the county

Petty jurors,
who are liable.

(*g*) 6 Geo. 4, c. 50.

(*h*) 33 & 34 Vict. c. 77.

sessions (i). Every burgess is qualified and liable to serve on the grand and petty juries at the borough quarter sessions (k).

Exemptions
from serving
on petty juries.

Certain exemptions from serving on juries are enumerated by the Juries Act, 1870. The following are amongst those exempted:—Peers, Members of Parliament, clergymen, Roman Catholic priests, ministers of any congregation of Protestant Dissenters or Jews whose place of meeting is duly registered, provided they follow no secular occupation except that of school-master; those actually practising in the law as barristers, solicitors, managing clerks, &c.; officers of the law courts, and acting clerks of the peace or their deputies; coroners; gaolers and their subordinates, and keepers in public lunatic asylums; physicians, surgeons, apothecaries, pharmaceutical chemists actually practising; officers of the navy, army, or militia, or yeomanry, if on full pay; pilots; certain persons engaged in the civil service; officers of the police; magistrates to a certain extent; burgesses as regards the sessions of the county in which their borough is situated (l).

These exemptions must be claimed before the revision of the list by the justices (m). Aliens domiciled in England or Wales for ten years or upwards may be jurors, if otherwise qualified (n). Convicts unless pardoned, and outlaws are disqualified (o).

The jury list.

The mode in which the sheriff's list of jurors is prepared is the following:—The clerk of the peace of every county, riding, or division, on or before July 20th

(i) 6 Geo. 4, c. 50, s. 1.

(k) 5 & 6 Wm. 4, c. 76, s. 121.

(l) 33 & 34 Vict. c. 77, s. 9. See also 34 & 35 Vict. c. 103, s. 30.

(m) Ibid. s. 12.

(n) Ibid. s. 8.

(o) Ibid. s. 10. As to special jurors, v. p. 393.

of each year, issues a precept to the churchwardens and overseers of the poor of the several parishes, and the overseers of the poor of the several townships, requiring them to make out before September 1st a list of persons within their jurisdiction qualified and liable to serve on juries as above. The churchwardens and overseers make out the lists, affixing a copy to every public place of worship on the first three Sundays in September. The justices correct these lists at a special petty sessions held in the last week of September. The lists are then copied by the clerk of the peace into the jurors' book; and this is delivered to the sheriff for use during the ensuing year (*p*). Before each assizes or sessions a precept issues to the sheriff, requiring him to return a competent number of jurors from those whose names appear in the current jurors' book. The *panel* (an oblong piece of parchment) The panel. must contain the names of the competent number alphabetically arranged, with their places of abode and additions. The jurors must be summoned six days at least before they are required to attend (*q*). The names of the petty jurors who attend are registered, and each juror may require from the clerk of the peace a certificate of his attendance. This exempts Exemptions on ground of service. him from liability to serve again as a petty juror at the assizes for one year after he has served as such in Wales, Hereford, Cambridge, Hunts, or Rutland, four years in York, and two years in any other county, and from liability to serve again as a grand or petty juror at the sessions for one year after he has served as such in Wales or one of the four above-named counties, or two years in any other county. In Middlesex a person is exempted from serving as a juror at any sessions of *nisi prius* or gaol delivery, if he has served as such in either of the two terms or vacations next immediately preceding (*r*).

(*p*) v. 6 Geo. 4, c. 50; 25 & 26 Vict. c. 107; 33 & 34 Vict. c. 77.

(*q*) 33 & 34 Vict. c. 77, s. 20.

(*r*) 6 Geo. 4, c. 50, s. 42.

Fining jurors
for non-
attendance.

Jurors who have been summoned not attending, and not giving sufficient reason for their absence, and in court having been three times ordered to appear and save their fines, may be fined. Of course, no person who was on the grand jury by which the bill was found can sit upon the petty jury by which it is tried.

Putting the
jurors into the
box.

The names of the jurors summoned are written on tickets and put into a box. The twelve first drawn are sworn on the jury, unless absent, excused, or challenged, or unless a previous *view* of some matter connected with the subject in issue has been ordered by the court, in which case the jurors who have had the view are sworn first. The remaining jurors are either ordered by the judge to remain in attendance in case their services should be required, or are allowed to retire until another day, or are released altogether, according to the discretion of the judge.

Giving the
prisoners their
challenges.

The prisoner or prisoners, for usually a batch of them are brought up at the same time to appear before the jury, are apprised of their right to object to or *challenge* any of the jurors by the clerk of the arraigns or other officer of the court in the following terms:—
“Prisoners, these men that you shall now hear called are the jurors who are to pass between our sovereign lady the Queen and you upon your respective trials (or, in a capital case, upon your life and death); if, therefore, you, or any of you, will challenge them, or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard.” The twelve jurors are then called by the proper officer. Challenges may be made not only on behalf of the prisoner, but also on behalf of the Crown. They are of two kinds: (a.) For cause; (b.) Peremptory. The former are either:—

- i. To the *array*, when exception is taken to the whole panel.

- ii. To the *polls*, when particular individuals are objected to.

i. The *challenge to the array* is an objection to the whole body of jurors returned by the sheriff, not on account of their individual defects, but for some partiality or default in the sheriff or his under-officer who arrayed the panel. It may be either (a.) A *principal* challenge, which is founded on some manifest partiality, as if the sheriff be the prosecutor or person injured, or be closely connected with such person, or if he have any pecuniary interest in the trial, or be influenced in his return of jurors by the prosecutor or defendant, or if he be counsel, attorney, &c., in the case; or it may be founded on some error on the part of the sheriff. If the cause of challenge is substantiated the court will quash the array. (b.) Challenge for favour, in cases where the ground of partiality is less apparent and direct, as when one of the parties is tenant to the sheriff.

The challenge to the array ought to be in writing, and must state specifically the ground of objection. How is it to be determined whether it shall take effect? The other side, prosecution or defence, may either plead to the challenge, traversing or denying its cause, or may demur to it as insufficient. If it is demurred to, the court will decide the demurrer. If the other side pleads to the challenge, two triers are appointed by the court (generally from the jurymen returned), and are sworn and charged to try whether the array is an impartial one. Sometimes it is tried by the coroners, or by others, the mode being left to the discretion of the court (s). If the challenge is found to be well-grounded, a new *venire* is awarded to the coroners; or, if they are interested, to the *elisors* (two clerks of the

court, or two persons named by the court and sworn). The return of these elisors cannot be questioned.

Though the challenge to the array be determined against the party, he may still have—

Challenge to
the polls :

ii. A *challenge to the polls*.—This is also either (a) principal; or (b) for favour.

principal.

Principal challenges may be subdivided into these:—

Propter honoris respectum—where a peer or lord of parliament is sworn on a jury for the trial of a commoner.

Propter defectum—that is, on account of some personal objection, as alienage, infancy, old age, or a want of the requisite qualification.

Propter affectum—where there is supposed to be a bias or prospect of partiality, as on account of the relationship of a juror; or where an actual partiality is manifested, or where a juror has expressed an opinion as to the result of the trial.

Propter delictum—if a person has been convicted of an infamous crime (*e.g.*, treason, felony, perjury, &c.), and has not been pardoned, or has been outlawed (*t*).

for favour.

Challenges *for favour* are made when there is reasonable ground for suspicion (as if a fellow-servant be one party), but there is not sufficient ground for a principal challenge *propter affectum*.

Trial of the
challenge.

The challenge to the polls is generally made orally, and must be made before the juror has kissed the book, though often the publicity of the matter is avoided by previous intimation of the objection being

made to the proper officer, and in such case probably the juror objected to would not be called. How is the validity of the challenge to be determined? If it is a principal challenge, by the court itself; if a challenge for favour, by two jurors who have already been sworn. But if the challenge for favour is of one of the first two jurors, the court appoints two indifferent persons, thence termed "triers," to try the matter; but they are superseded as soon as two are sworn on the jury. Witnesses may be called to support or defeat the challenge, and the person objected to also may be examined, but not asked questions which tend to his discredit. It should be noticed that, as a rule, a person may challenge himself, upon which he may be examined on oath as to the cause. So the sheriff may suggest the objection to his array on the ground of his relationship, &c.

The Crown may order any number of persons called as jurors to stand by, and has not to shew any cause for excluding them, until the panel has been gone through and it appears that there will not be left enough jurors without those ordered to stand by (u). Exclusion of jurors by the Crown.

So much for challenges for cause, to the number of which there is no limit, and the rules as to which are generally alike both in criminal and civil cases. But there is another kind of challenge known to the criminal law alone.

Peremptory Challenge.—In felonies the prisoner is allowed to arbitrarily challenge, and so exclude, a certain number of jurors without shewing any cause at all. He cannot claim this right in misdemeanors (x); Peremptory challenge.

(u) *v. Mansell v. R.*, 27 L. J. (M.C.) 4.

(x) "It is equally absurd that in the case of a trifling theft the prisoner should have the right of peremptorily challenging twenty jurors, whilst a man accused of perjury might see his bitterest enemy in the jury box, and be unable to get rid of him as a juror, unless he could give judicial proof of his enmity."—Fitz. St. 106.

but it is usual, on application to the proper officer, for him to abstain from calling any name objected to by the prosecution or defendant within reasonable limits; and this course has been sanctioned by the court (*y*).

Number of
peremptory
challenges.

The defendant may peremptorily challenge to the number of thirty-five in treason, except in that treason which consists of compassing the Queen's death by a direct attempt against her life or person (*z*). In such excepted case, in murder, and all other felonies, the number is limited to twenty (*a*). If challenges are made beyond the number allowed, those above the number are entirely void, and the trial proceeds as if no such extra challenge had been made (*b*).

The court itself may take out of the panel the names of any jurors and insert others where such a course is necessary (*c*).

If a sufficient number of jurors do not appear, or if by means of challenges or exemptions a sufficient number of unexceptionable ones do not remain, either side may pray a *tales*, that is, a supply of *such* men as are summoned upon the panel, in order to make up the deficiency (generally from the bystanders, *tales de circumstantibus*); but this course seems to require a warrant from the attorney-general (*d*). The usual course, however, at the assizes, is for the judge to order the

(*y*) The reasons which Blackstone assigns are (1) As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one against whom he has conceived a prejudice, even without being able to assign a reason for such dislike. (2) Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment.—4 Bl. 353.

(*z*) 39 & 40 Geo. 3, c. 93.

(*a*) 6 Geo. 4, c. 50, s. 29.

(*b*) 7 & 8 Geo. 4, c. 28, s. 3.

(*c*) 6 Geo. 4, c. 50, s. 20.

(*d*) 2 Hawk. c. 41, s. 18; 4 Bl. 355; Arch. 169.

sheriff to return a new panel *instantly*, without further precept; and at sessions, for the justices to issue a special precept commanding the sheriff to return a sufficient number of jurors immediately.

When the jury have once been sworn they cannot leave the box without the leave of the court, and then only in company with some officer of the court. If, in consequence of being unable at once to come to a conclusion, they obtain leave to withdraw in order to consider their verdict, they are kept apart from any one, under the charge of an officer, who is sworn not to speak to them (except to ask them whether they have agreed), or suffer any one else to do so. Their verdict will be set aside if they speak with any one interested, or cast lots as to which way they shall decide. In these and other cases of delinquency they may be fined. By leave of the court they may have reasonable refreshment (e). If the trial is adjourned over night in *treason* or *felonies*, the jury retire in custody of the sheriff and his officer, who are sworn to keep them together. In *misdemeanors* they are allowed to go home on engaging not to listen to anything spoken to them as to the case under trial. If during the trial, before verdict is given, one of the jury dies, or is taken so ill that he is not able to proceed with the trial, or without permission leaves the box (f), the jury is discharged and a new one sworn to try the case. Of course in such an event the remaining eleven may, and most frequently will, be in the new jury.

Conduct of
the jury.

We have been hitherto referring to *common* juries. Special juries. But as in civil, so in criminal cases, *special* juries are sometimes summoned. But this is only in misdemeanors, where the record is in the Queen's Bench Division, and only by permission of the court on

(e) v. 33 & 34 Vict. c. 77, s. 23.
(f) *R. v. Wood*, 10 Cox, 573.

motion of either the prosecutor or the defendant. The party applying for a special jury must pay the extra fees and expenses, unless the court certifies that it was a proper case to be tried by a special jury. These jurors are taken from a higher class than common jurors, their qualifications being determined by statute (g). The instances of the trial of a criminal case by a special jury are so rare, that we need not enter into further particulars.

Jury *de*
medietate
linguæ.

Another exceptional form of jury was, until lately, sometimes demanded; a jury *de medietate linguæ*. Formerly, in cases of felony or misdemeanor, but not of treason, an alien might claim his right to be tried by a jury, half of whose number were aliens, or, at least, if not half, as many as the town or place could furnish. But this privilege was taken away by the Naturalization Act, 1870 (h); and now an alien is tried as if he were a natural born subject (i).

(g) 33 & 34 Vict. c. 77, s. 6.

(h) 33 & 34 Vict. c. 14, s. 5.

(i) We have already referred to another case of a so-called jury *de medietate linguæ*, v. p. 314.

CHAPTER XIV.

THE HEARING.

THE full complement of jurors having been obtained, they are sworn; or, if any of them on conscientious grounds object to the oath, they make the statutory declaration (*j*). The oath, and mode of taking it, differ slightly in felonies and in misdemeanors. In felonies, each juror is sworn separately in the following terms: "*You shall well and truly try, and true deliverance make, between our sovereign lady the Queen and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God.*" In misdemeanors, four take hold of the book at the same time, and four, or sometimes all, are sworn together. The oath is: "*You shall well and truly try the issue joined between our sovereign lady the Queen and the defendant, and a true verdict give according to the evidence. So help you God*" (*k*).

After the jury are sworn, in cases of treason or felony, the crier at the assizes makes the following proclamation: "*If any one can inform my lords the Queen's justices, the Queen's attorney-general, or the Queen's serjeant, ere this inquest taken between our sovereign lady the Queen, and the prisoners at the bar, of any treason, murder, felony, or misdemeanor, committed*"

Swearing the jury.

Proceedings at the hearing.

(*j*) 30 & 31 Vict. c. 35, s. 8.

(*k*) *v. Fitz.* St. p. 57, as to the historical cause of this distinction, the terms of the oath in a misdemeanor shewing the resemblance of procedure in a misdemeanor to that in a civil action; that in felony reminding us of the days "when the jury were both judges and witnesses, who reported on the prisoner's guilt or innocence of their own knowledge."

Course of
examination,
&c.

or done by them, or any of them, let him come forth, and he shall be heard; for the prisoners stand at the bar upon their deliverance." The clerk of arraigns or of the peace, having called the prisoner to the bar, says to the jury: "*Gentlemen of the jury, the prisoner stands indicted by the name of John Styles, for that he on the* (reciting the substance of the indictment). *Upon this indictment he has been arraigned, and upon his arraignment he has pleaded that he is not guilty; your charge, therefore, is to inquire whether he be guilty or not guilty, and to hearken to the evidence."* In misdemeanors, the jury are not thus charged. The counsel for the prosecution now opens the case to the jury, stating the principal facts, which the prosecution intend to prove. He then calls his witnesses; who, having been sworn, are examined by him, and then subjected to cross-examination by the counsel for the defence; or, if the prisoner is not defended by counsel, to any questions which the prisoner may put to them. The counsel for the prosecution may re-examine on matters referred to in the cross-examination. The court also may, at any time, interpose, and ask questions of the witnesses. After the case for the prosecution is closed, it is ascertained whether the defence intend to call any witnesses. If they do not, the counsel for the prosecution may address the jury a second time in support of his case, for the purpose of summing up the evidence against the prisoner (*l*); but this right will be exercised only in exceptional cases, as where the evidence materially differs from the counsel's instructions. But if the prisoner has witnesses whom he wishes to call, his counsel opens the case for the defence, and calls these witnesses in support thereof. They also are subject to cross-examination by the counsel for the prosecution, and re-examination by the counsel for the defence on this cross-examination. The counsel for

(*l*) 28 Vict. c. 18, s. 2.

the prisoner is now entitled, at the close of the examination of his witnesses, to sum up his evidence (*m*).

After this address by the counsel for the defence, the counsel for the prosecution has the right of reply. This is in consequence of the defence having adduced evidence, written or parol, in defence (but mere evidence to character has not, in practice, this result); for if he has not done so, the address of the counsel for the defence is the last. There is, however, one exception. When the Attorney-General, or some one else as his representative, is prosecuting, he has the right of reply, although no evidence has been adduced for the defence (*n*). If two prisoners are jointly indicted for the same offence, and only one calls witnesses, the counsel for the prosecution has the right to reply generally; but not if the offences are separate and the prisoners might have been separately indicted (*o*). If the prisoner is not defended by counsel, he may cross-examine the witnesses for the prosecution and examine his own witnesses; and, at the end of such examination, address the jury in his own defence (*p*). And if one only of two prisoners jointly indicted is defended by counsel, the undefended one may cross-examine and examine as above, and make his statement to the jury before or after the address of the counsel for the other, as the court thinks fit. If the prisoners jointly indicted are defended by different counsel, each counsel cross-examines, and addresses the jury in order of seniority at the bar; or, if the judge thinks desirable, in order of the names of the prisoners on the indictment (*q*). If a prisoner defended by counsel wishes to address the jury and examine and cross-examine witnesses, he may do so; and his counsel may argue points of law, and suggest

(*m*) 28 Vict. c. 18, s. 2.

(*n*) *R. v. Toakley*, 10 Cox, 406.

(*o*) *R. v. Jordan*, 9 C. & P. 118.

(*p*) See Appendix to this chapter.

(*q*) Arch. 172. But this point does not seem to be clearly settled. *R. v. Meadows*, 2 Jur. (N.S.) 718. *R. v. Holman*, 3 Jur. (N.S.) 722.

questions to him in cross-examination; but he cannot have counsel to examine and cross-examine witnesses, and reserve to himself the right of addressing the jury (r).

Nevertheless he has sometimes been allowed to do so. In some cases the prisoner, though represented by counsel, has been unconditionally allowed to make a statement (s). In another case the judge intimated that he would always allow the prisoner to make his own statement, in addition to his counsel's speech, but would at the same time give the prosecution a right of reply (t). As to the practice of allowing counsel defending a prisoner to make, in his address to the jury, a statement of facts not intended to be proved, it has varied. In one case counsel was not allowed to do so, without giving the prosecution the right to reply (u). In another and more recent case the late Lord Chief Justice allowed the prisoner's counsel to do so without any such condition, observing that the prisoner's counsel stood in the place of the prisoner, and was entitled to say anything which the prisoner might say, for which he would be entitled to consideration and credence, if consistent with the rest of the evidence (v). Relying on this case, Mr. Russell, Q.C., in the trial of O'Donnell endeavoured to do the same thing. The Attorney-General objected but afterwards withdrew the objection. After this trial a correspondence took place between the Attorney-General and Lord Coleridge, L.C.J., in which the latter states that at a meeting of the judges held in the Queen's Bench room on the 26th November 1881, the following resolution was come to, viz: "That in the opinion of the judges it is contrary

(r) *R. v. White*, 3 Camp. 97.

(s) *R. v. Dyer*, 1 Cox, 113; *R. v. Mansana*, 2 F. & F. 64; *R. v. Williams*, 1 Cox. 363.

(t) Per Cave J. in *R. v. Lowe*, Liverpool Assizes, May 1882.

(u) *R. v. Butcher*, 2 Mood. & Rob. 228 (per Coleridge, J.)

(v) *R. v. Weston*, 14 Cox, 346.

to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence (*w*).

It will simplify matters if we tabulate the steps in the various cases which may occur.

Order of proceedings at the hearing.

i. *The prisoner defended by counsel, and adducing evidence in defence.*

Counsel for prosecution opens his case.

Counsel for prosecution examines his witnesses, who may be then cross-examined and re-examined.

Counsel for defence opens his case.

Counsel for defence examines his witnesses, who may be then cross-examined and re-examined.

Counsel for defence sums up his case.

Counsel for prosecution replies.

ii. *Prisoner defended by counsel, but not adducing evidence.*

Counsel for prosecution opens his case.

Counsel for prosecution examines his witnesses, who, &c.

Counsel for prosecution sums up his case (*x*).

Counsel for defence addresses the jury.

(*w*) v. the Weekly Notes of the *Law Journal*, *Law Times*, &c.

(*x*) v. p. 396.

iii. *Prisoner not defended by counsel, but adducing evidence.*

Counsel for prosecution opens his case.

Counsel for prosecution examines his witnesses, who, &c.

Prisoner examines his witnesses, who, &c.

Prisoner addresses the jury.

Counsel for prosecution replies.

iv. *Prisoner not defended by counsel, and not adducing evidence.*

Counsel for prosecution opens his case.

Counsel for prosecution examines his witnesses, who, &c.

Prisoner addresses the jury.

The summing
up.

The only other proceeding before the jury consider their verdict is the summing-up by the judge, or, at the sessions, by the chairman or recorder. The object of this is to explain the law as applicable to the case under trial, and to marshal the evidence so that it may be more readily understood and remembered by the jury. He first states to them the substance of the charge against the prisoner; he then, if necessary, explains to them the law upon the subject; he next reads the evidence which has been adduced in support of the charge, making occasionally such observations as may be necessary to connect the evidence, to apply it to the charge, and to render the whole plain and intelligible to the jury; he then states the defence, and the evidence given on the part of the defendant; and he usually concludes by telling the jury that, if upon considering the whole of the evidence they entertain a fair

and reasonable doubt of the guilt of the prisoner, they should give the prisoner the benefit of that doubt, and acquit him (y).

APPENDIX (Fitz. St. 196).

"The common run of criminal trials passes somewhat thus: Ten or twelve awkward clowns, 'looking,' as an eminent advocate once observed, 'like overdriven cattle,' are crowded together in the dock. Their minds are confounded by formulas about challenging the jury, standing on their deliverance, and pleading to the indictment: the case is opened, and the witnesses called by a man to whom the whole process has become a mere routine, and whose very coolness must confuse and bewilder ignorant and interested hearers. After the witness has been examined, comes a scene which most lawyers know by heart, but which I can never hear without pain. It is something to the following effect:—

Examination
of witnesses
by the
prisoner, a
farce.

"*Judge*.—'Do you wish to ask the witness any questions?'

"*Prisoner*.—'Yes, sir. I ask him this, my lord. I was walking down the lane with two other men, for I'd heard——'

"*Judge*.—'No, no, that's your defence. Ask him questions. You may say what you please to the jury afterwards; but now you must ask him questions.'

"In other words, the prisoner is called upon, without any previous practice, to throw his defence into a series of interrogatories, duly marshalled, both as to

(y) Arch. Q. S. 619. In an American case it has been decided that a judge may, when the evidence is clear and uncontradicted, and the character of the witnesses unshaken, tell the jury that it is their duty to convict. *Commonwealth v. Magee*, 12 Cox, 549.

The summing up of the judge "may, and generally does, indicate his opinion, but it is an opinion which is the result of the evidence laid before him, and not of an independent inquiry."—Fitz. St. 161.

the persons to be asked and as to the subjects to be inquired into; an accomplishment which trained lawyers often pass years in acquiring imperfectly. After this interruption has occurred three or four times in the course of a trial, the prisoner is not unfrequently reduced to utter perplexity and forgetfulness, and thinks it respectful to be silent."

CHAPTER XV.

THE WITNESSES.

FORMERLY many more classes of persons were excluded, Grounds of incompetency now reduced. as incompetent, from giving evidence, than are at the present day. An objection to the testimony of a witness generally operates in another way now. Instead of excluding it altogether, the objection weakens the testimony and prevents the jury from placing ordinary credit in it; at the same time giving them the opportunity of gathering therefrom as much truth as possible. Thus, it has been provided by statute that no person offered as a witness shall be excluded by reason of incapacity from *crime* or *interest* from giving evidence (2); two grounds of incompetency which formerly prevailed. However, even now a person under sentence of death is incapable of giving evidence (a).

The forms of incompetency at present existing Forms of incompetency. are:—

1. Incompetency of the accused, and the wife or husband.
2. Incompetency from want of understanding.
3. Incompetency on account of the relationship of legal adviser.

Though incompetency from want of religious belief may be regarded as a thing of the past, it is important to notice it.

(2) 6 & 7 Vict. c. 85, s. 1.

(a) *R. v. Webb*, 11 Cox, 133.

1. *Incompetency of accused, and the wife or husband.*

Incompetency
of accused, and
accused's con-
sort.

It is a general principle of English law that no one is bound to criminate himself (*nemo tenetur prodere seipsum*). In other words, the accused cannot be examined as a witness either for the prosecution or the defence. It is obvious that if he were examined as a witness in his own defence, being subjected also to cross-examination by the counsel for the prosecution, he might be compelled to answer questions which would criminate himself (*b*). There are one or two exceptions to this principle. One case referred to is under the Merchant Shipping Act, 1875 (*c*), where it is provided that one accused of sending an unseaworthy ship to sea may give evidence in the same manner as any other witness, for the purpose of shewing that he used all reasonable means to make and keep the ship seaworthy, &c. (*d*). So also a person charged with buying or receiving arms, equipments, &c., from a soldier, or the husband or wife of such person, may be a witness (*e*).

In some cases a wrongdoer is not excused from answering questions on the ground that his answer may tend to criminate himself; but on his making full disclosure he is shielded from all ill consequences; for example, 17 & 18 Vict. c. 38, s. 5.

Fellow-
prisoner can-
not be called
as witness.

Defendants jointly indicted and given in charge to the jury, and being tried together, cannot be called as witnesses for or against each other. But, as we have

(*b*) The interrogation of prisoners, subject to certain provisions, is recommended by Sir James Stephen. See Gen. View Crim. Law, 189, where the whole subject is entered into, and where the system of non-interrogation is shewn to be of modern date. The reader will remember that the interrogation of prisoners is one great feature of French criminal procedure.

(*c*) 38 & 39 Vict. c. 88, s. 4; v. p. 147.

(*d*) The first instance in modern times of a prisoner being examined occurred at the Liverpool Spring Assizes, 1876, when the innovation gave rise to some very severe condemnatory remarks by Mr. Justice Brett.

(*e*) 42 & 43 Vict. c. 33, s. 149; v. p. 63.

seen (*f*), the course is sometimes adopted of applying for an acquittal of one of the co-defendants, in order to make him a witness for the prosecution, and the other defendants cannot object to this (*g*). If a second person is indicted with the design of closing his mouth and preventing him from giving evidence, the court may direct his acquittal, if there is no evidence to affect him, or may order him to be tried separately, so that his testimony may be admitted. A defendant who has pleaded guilty may be examined as a witness for or against his co-defendants, even before he has received sentence.

Husband and wife.—In treating of the evidence of a wife, it may be understood that the same rules, *mutatis mutandis*, apply to the evidence of a husband.

As a rule the wife cannot be a witness for or against her husband. Not only this, but she cannot be a witness for any other person indicted jointly with her husband, where her testimony would tend to her husband's acquittal, though only remotely, as, for instance, merely by shaking the evidence of a witness (*h*). And if several prisoners, jointly indicted, are being tried together, the wife of one of them cannot be called as a witness for or against any of the prisoners (*i*). But to bring the case under this incompetency or exception, the parties must have been actually married; mere cohabitation will not suffice.

There are a few exceptions to this principle, one of which is doubtful.

(a.) In high treason it is said that husband and

(*f*) v. p. 374.

(*g*) *R. v. Rowland*, Ry. & M. 401.

(*h*) *R. v. Smith*, 1 Mood. C. C. 289.

(*i*) *R. v. Thompson*, L. R. 1 C. C. R. 377; 41 L. J. (M.C.) 112.

wife may be witnesses against each other, but no instance can be given (*j*).

(b.) In cases of personal injury (*e.g.*, assault) by husband to wife, and *vice versa*.

(c.) In indictments or proceedings for the purpose of trying or enforcing a civil right only (*k*).

(d.) On proceedings before a court of summary jurisdiction under the Army Discipline Act, 1879, for the offences of buying from soldiers, or being unlawfully in possession of regimental arms, equipments, &c. (*l*)

(e.) And now under the Married Women's Property Act, in criminal proceedings under that Act taken by a husband or wife against the other, he or she is competent to give evidence against the other (*m*).

In bigamy, of course the so-called second wife is a competent witness; also in forcible abduction and marriage, the marriage here being invalid, the parties may give evidence against each other.

No other relationship entitles to exemption. Parents and children, brothers and sisters, masters and servants may be, and constantly are, called to give evidence for or against each other.

2. *Incompetency from want of understanding.*

Incompetency
of idiots.

Generally the same rules which serve to render a person incapable of committing a crime, apply to exclude a person from being a witness. Thus an idiot or a lunatic, unless in an interval of sanity, is incom-

(*j*) v. Rose. 127. R. v. Griggs T. Raym. 1 (an *obiter dictum*).

(*k*) 40 Vict. c. 14, s. 1; v. p. 440, n.

(*l*) 42 & 43 Vict. c. 33, s. 149; v. pp. 63, 391.

(*m*) 45 & 46 Vict. c. 75, s. 12.

petent, it being the province of the court to ascertain whether a person is able to understand the nature of an oath and to give evidence. Persons deaf and dumb, or dumb only, may give evidence through an interpreter.

As to children, the rule is somewhat different from Children. that which prevails when the question is whether the child is responsible for its acts. An infant under the age of seven is incapable of committing a crime, but it is competent to give evidence at any age, if it satisfies the test, namely, if it has sufficient intelligence to understand the nature and obligation of an oath (n). The judge frequently, before allowing a child to be sworn, questions it as to its belief in God, knowledge of the consequences of telling a lie, &c.

3. *Incompetency on account of the relationship of legal adviser.*

Counsel, solicitors, and their agents are not obliged, nor are they allowed without the consent of their clients, to give evidence of communications, written or parol, made to them by their clients in their professional capacity. And it is not material whether the communications were made in the case under trial, or not, nor whether the client be a party to the cause. But of course they may be witnesses on points which do not come within the sphere of professional confidential communications; for example, to prove their client's handwriting or his identity. This privilege does not apply to a medical attendant, a conveyancer, a priest, nor indeed to any others than those mentioned above.

In some cases the court will not compel or allow the

Certain facts
not disclosed.

(n) v. Fitz. St. 287, as to the evidence of children, though frequently based on imagination, having too much weight, on account of the sympathies of the jury.

disclosure of a particular fact, if such disclosure may be of detriment to the public service, and does not bear directly upon the matter in question, for example, evidence disclosing the channels through which information reaches the government (o).

Incompetency from want of religious belief (p).

Religious
belief and in-
competency.

Formerly a person who had no religious belief which he deemed binding upon his conscience to speak the truth upon oath could not be a witness. But now this incompetency appears to have been done away with by a recent statute (q), which provides that those who object to taking an oath, or are objected to as incompetent to take an oath, the court being satisfied that the taking of an oath would have no binding effect on their conscience, shall make a promise and declaration in the prescribed form:—“*I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.*” Any person who, having made this declaration, wilfully and corruptly gives false evidence, is liable to be indicted, tried, and convicted as if he had taken an oath. For some time those who had some religious belief, but who conscientiously objected to oaths, such as Quakers, Moravians, and Separatists, had been admitted as witnesses on their making the statutory form of solemn affirmation or declaration (r).

Forms of oath
according to
creed.

The form of oath varies according to the creed of the witness. In the case of an ordinary Christian, the witness, holding the New Testament in his bare right hand, is thus addressed by an officer of the court:—
“*The evidence you shall give to the court and jury, sworn*

(o) *v. Hardy's Case*, 24 How. St. Tr. 753.

(p) For a full discussion of the question, *v. Omichund v. Barker*, Willea, 538; 1 Smith's Leading Cases.

(q) 32 & 33 Vict. c. 68, s. 4.

(r) *v. 3 & 4 Wm. 4. c. 49; 3 & 4 Wm. 4. c. 82; 1 & 2 Vict. c. 77; 24 & 25 Vict. c. 66.*

between our sovereign lady the Queen and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth. So help you God." He then kisses the book. Jews are sworn on the Pentateuch, keeping their hats on, the oath concluding with "So help you Jehovah." In the case of others, the form which they consider binding is resorted to; thus a Chinese may be sworn by means of a cracked saucer (s).

The objection to the competency of a witness should be made before he has been examined in chief, unless, of course, the incompetency appears only on examination.

Objection to competency, when made.

CREDIBILITY OF WITNESSES.

As we have already seen, instead of altogether excluding a witness on account of some supposed bias, the course generally adopted is to admit his evidence, allowing the circumstances causing suspicion to affect his credibility. The great canon as to the credit of witnesses is, that it is for the jury to form their opinion thereon, as on any other fact. "The credibility of a witness is compounded of his knowledge of the facts he testifies, his disinterestedness, his integrity, his veracity, and his being bound to speak the truth by such an oath as he deems obligatory. Proportioned to these is the degree of credit his testimony deserves from the court and jury" (t).

Elements determining the credibility of witnesses.

We have just noticed the means taken to secure the most stringent obligation by oath or affirmation.

As to *knowledge*.—It will be important to consider on what the witness bases his conclusion; what opportunities he had of satisfying himself; what were the surrounding circumstances, whether they were

Knowledge of witnesses.

(s) v. Best, Ev. 233.
(t) Arch. 233.

such as to conduce to a correct opinion; for example, whether it was light or dark, &c.

Disinterested-
ness of
witnesses.

As to *disinterestedness*.—Here should be considered the relationship of the prisoner and witness, natural or otherwise; the advantage or disadvantage that would accrue to the witness on the prisoner's conviction; prejudices, quarrels, &c. (*u*).

Veracity of
witnesses.

As to *veracity*.—The chief mode in which the veracity of a witness is impeached is by shewing that at some former time he has said or written, or, what is more damaging, sworn, something not agreeing with or opposed to that which he now swears. As to the manner in which he may thus be confronted with his former allegations, it is provided by 28 Vict. c. 18, that if, on cross-examination, a witness does not admit having made a former statement, proof may be given that he did make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement (*v*). If the statement has been in writing, he may be cross-examined as to it without the writing being shewn to him; but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. But this does not prevent the judge from inspecting and making such use of the writings as he thinks proper (*w*). The writing most frequently used to impeach the testimony of a witness is his deposition taken before the magistrate.

(*u*) As to the evidence of accomplices, v. p. 412.

(*v*) 28 Vict. c. 18, s. 4.

(*w*) Ibid. s. 5.

As to *general character*.—It has been noticed above Character of witnesses. that a person is a competent witness although he has been convicted of a crime; but of course that fact will carry weight with the jury. To weaken the testimony of a witness, either one of two courses may be taken. The witness may be cross-examined as to his delinquencies, or other witnesses may be called to prove his generally bad reputation. After considerable conflict between the authorities, it seems to be settled that a witness may be asked questions with regard to alleged crimes or other improper conduct; but that he is not compelled to answer them if such answer would tend to expose him to a criminal charge, or to a penalty or forfeiture of any kind (x). And the court will decide whether the witness has shewn reasonable grounds for believing that the answer will tend to criminate him (y). But all other questions must be answered, however strongly they may reflect on the witness's character. And a denial of improper conduct by the witness is conclusive, and he cannot be contradicted by calling other witnesses, unless of course the fact be relevant to the issue (z). A witness may be questioned as to whether he has been convicted of a felony or misdemeanor, and, if he does not admit it, the cross-examining party may prove the conviction (a). In order to shew the general bad character of the witness, almost any question may be asked as to his past life. It is left to the discretion and good feeling of the bar not to exceed the limits required by the necessities of the case, by wantonly taking away a person's character (b). When other witnesses are called to shew the bad character of the witness, the object is to shew that the former, from their acquaint-

(x) v. 2 T^{aylor's Evidence}, Part III. c. 3.

(y) *R. v. Boyce*, 30 L. J. (Q.B.) 301.

(z) *Yewin's Case*, 2 Camp. 638. It has been doubted whether such discrediting questions must be answered, if they are not otherwise material to the issue.

(a) 28 Vict. c. 18, s. 6.

(b) v. Fitz. St. 296.

ances with the latter, are of the opinion that he is not to be believed on oath. But they may not be examined as to any particular offences which are alleged against the witness. On the other hand, witnesses may be called to testify to the general good character of the witness, if that is questioned.

NUMBER OF WITNESSES.

Cases where more than one witness is required.

In all cases, both before the grand jury and at the trial, one witness for the prosecution is sufficient, with the following exceptions:—

1. In *treason* or misprision of treason (except where the overt act alleged is the assassination of the Queen, or any direct attempt against her life or person) two witnesses are required, unless the prisoner confesses. And both of the witnesses must testify to the same overt act of treason; or one of them to one overt act, and another to an overt act of the same species of treason (*c*). But of course collateral facts may be proved by one witness.

2. In *perjury* there must be two witnesses. Both need not necessarily directly contradict what the accused has sworn; it will suffice if the second corroborates in any material circumstance, by circumstantial evidence or otherwise, what the first has said (*d*). The reason usually assigned for this exception is that otherwise there would only be oath against oath; but more probably the expediency of protecting witnesses, and thus furthering the ends of justice, is the true ground (*e*).

Evidence of accomplices.

It will be convenient here to notice the evidence of *accomplices*. Naturally it is viewed with suspicion, inasmuch as, on the one hand, the accomplice may

(c) 7 & 8 Wm. 3, c. 3, ss. 2, 4.

(d) v. cases, &c., Best, Ev. 759.

(e) Best, Ev. 754.

hope to gain favour and leniency by assisting the prosecution; on the other hand, he will often be anxious to shield his companions. In practice, though not in strict law, it is deemed essential that the evidence of the accomplice should be corroborated in some material part by other evidence, so that the jury may be led to presume that he has spoken the truth generally. This confirmatory evidence must be unimpeachable; so that the evidence of another accomplice or his wife will not suffice. And the confirmatory evidence should not be merely to the fact of the act having been committed, but should extend to the identification of the prisoner with the party concerned (*f*).

How is the *attendance of witnesses* procured? In both felonies and misdemeanors the witnesses examined are usually bound over by recognizance by the committing magistrate to appear at the trial and give evidence. If they do not appear, the recognizances may be estreated and the penalty levied. All other witnesses may be compelled to attend by *subpœna*. This may be issued either at the Crown office in London, or by the clerk of assize, or clerk of the peace at sessions. A copy of the writ is served upon the witness personally, the original writ being shewn to him. Attendance of witnesses.

If a written instrument, required as evidence, is in the possession of some person, he is served with a *subpœna duces tecum*, ordering him to bring it with him to the trial. Unless he has some excuse, allowed to be valid by the court, he must produce it at the trial. Such lawful excuses are the following: that the instrument will tend to criminate the person producing it; that it is his title-deed. Production of documents by witnesses.

Consequences
of not obeying
the *subpœna*.

In the event of the non-appearance of a witness in answer to a *subpœna*, he incurs certain penalties. If the writ has been sued out of the Crown Office, the Queen's Bench, upon application, will grant an attachment for the contempt of court. In other cases the proceedings must be by way of indictment (*g*). But to render a witness subject to these penalties, he must have been served personally, and served a reasonable time before trial. If his expenses have not been tendered, and he is so poor as not to be able to go to the trial, this will probably be allowed by the court as a sufficient excuse.

Attendance of
a witness who
is in custody.

If the witness is in custody, the proceedings are different. If in criminal custody, a secretary of state, or any judge of the superior courts, may, on application by affidavit, issue a warrant or order under his hand for bringing up such person to be examined as a witness (*h*); or his attendance may be secured by a writ of *habeas corpus ad testificandum*. If in civil custody, a writ of *hab. corp. ad test.* is obtained upon motion in court or application to a judge in chambers, founded upon an affidavit stating that he is a material witness. If the evidence of a person in court is required, he is bound to give it, although he has not been subpoenaed.

Witnesses'
privilege from
arrest.

A witness, whether subpoenaed or bound over by recognizance, either to prosecute or give evidence, is privileged from arrest whilst attending the trial on every day of the assizes or sessions until the case is tried; also for a reasonable time before and after trial whilst coming to or returning from the place of trial.

As we have seen, preventing a witness from attending or giving evidence is a contempt of court; and

(*g*) v. Arch. 321.

(*h*) 16 & 17 Vict. c. 30, s. 9.

intimidating a witness from giving evidence for the prosecution is a misdemeanor (i).

As to *witnesses' expenses*.—In *felonies*, the court may order the payment to the prosecutor and his witnesses of a reasonable sum for expenses, trouble, and loss of time; and this whether the result of the trial be a conviction or acquittal, or no bill be found (j). And although no bill be preferred, a like reasonable sum may be ordered to be paid to those who *bond fide* attend the court in obedience to their recognizances or *sub-pœna*. The amount to be paid for the attendance before the examining magistrate must be ascertained by the certificate of the magistrate granted before the trial (k). Further, if a charge is made *bond fide* on reasonable and probable cause, although there has been no committal for trial, the magistrate before whom the accused was brought and examined may grant to any witness examined a certificate of his expenses (l).

Expenses of witnesses for the prosecution.

In very many cases of *misdemeanor* there is a like power of ordering payment of witnesses' expenses. The particular misdemeanors will be found mentioned in 7 Geo. 4, c. 64, s. 23; 14 & 15 Vict. c. 55, ss. 2, 3; and other statutes which deal with individual offences. Each of the Criminal Consolidation Acts provides that the court, before whom any indictable misdemeanor punishable under such Act is prosecuted or tried, *may* allow the expenses of witnesses, as in felony; and in prosecutions by the *treasury* in coinage offences *shall* allow such expenses (m).

(i) v. p. 96.

(j) 7 Geo. 4, c. 64, ss. 22, 24, 25.

(k) Ibid. s. 22.

(l) 29 & 30 Vict. c. 52 (a temporary statute since continued yearly). This statute applies also to misdemeanors.

(m) 24 & 25 Vict. c. 96, s. 121; c. 97, s. 77, c. 98, s. 54; c. 99, s. 42; c. 100, s. 77.

In a similar manner, in certain indictable offences dealt with by the magistrates in the exercise of their summary jurisdiction, the magistrate may order the payment of witnesses' expenses (*n*).

Expenses of
witnesses for
the defence.

So much as to witnesses for the prosecution. The court has, however, also discretionary power to order the payment of the expenses of *witnesses for the prisoner* who appear after having been bound by recognizance by the examining magistrate to give evidence (*o*).

Payment of
costs by the
defendant.

In the event of a conviction for treason or felony, the court may order the prisoner to pay the whole or part of the costs of the trial; and in cases of assault the defendant, on conviction, may be made to pay the prosecutor's costs and a reasonable allowance for loss of time (*p*). It will be remembered that in cases under the Vexatious Indictments Act the prosecutor may, at the discretion of the court, be required to pay the defendant's costs on the acquittal of the latter (*q*); and also that, in private prosecutions for the publishing of a defamatory libel, if judgment is given for the defendant, he may recover costs from the prosecutor (*r*).

(*n*) 42 & 43 Vict. c. 49, s. 28.

(*o*) 30 & 31 Vict. c. 35, s. 5.

(*p*) 33 & 34 Vict. c. 23, s. 3.

(*q*) v. p. 360.

(*r*) 6 & 7 Vict. c. 96, s. 8; v. p. 118.

CHAPTER XVI.

THE EXAMINATION OF WITNESSES.

THIS is a subject on which, though a wide latitude is allowed to counsel, some rules may be laid down as directly authorized, others as developed in and sanctioned by practice.

We have already noticed the general course of the examination of witnesses (s); namely, that the witnesses for the prosecution are first examined in chief by the counsel for the prosecution, and then cross-examined by the counsel for the defence; and after the case for the prosecution has closed, then the witnesses for the defence are examined by the counsel for the defence, and cross-examined by the counsel for the prosecution; in each case the witness being re-examined by the party calling him, if it is thought desirable. It should also be remembered that the court may at any time put such questions as it thinks fit to the witness, even after he has left the witness-box; and that if, after the counsel has finished his examination or cross-examination, he thinks of some other question which ought to have been asked, that question can be put only through or by leave of the court. Through the court, also, are asked questions which occur to the jury.

All the witnesses whose names are on the back of the indictment should be called by the counsel for the prosecution; and although he does not ask them any

General course
of examina-
tion.

What wit-
nesses should
be called.

question or even call them, the defence may have them called, so that they may be subjected to cross-examination. But in such a case the counsel for the prosecution may re-examine (t).

Witnesses
ordered out
of court.

When any collusion is suspected among the witnesses, or it is thought that any of them will be influenced by what they hear from counsel or other witnesses, those who have not yet been examined are ordered to leave the court until they are wanted, and after examination they are required to remain in court. The judge will do this, either at his own instance, or on the application of the opposite party. If the order be disobeyed, the witness may be punished as for his contempt; but, though the disobedience will be matter of remark for the jury, the judge has no right to reject his testimony (u).

Functions, &c.
of the counsel
for the pro-
secution ;

At the outset it will be well to ascertain the position of the counsel for the prosecution and for the defence respectively, their functions and conduct, their respective parts, and the spirit in which they should conduct them. It is needless to observe that it is not the object of the counsel for the prosecution to get a conviction at any price. It is his duty to see that the case against the prisoner is brought out in all its strength; but it is not his duty to conceal, or in any way diminish the importance of, its weak points. His function is not to inquire into the truth, but to put forward, with all possible candour and temperance, that part of it which is unfavourable to the prisoner (v).

of the counsel
for the
prisoner.

On the other hand, the counsel for the prisoner has before him, as his object, the acquittal of the prisoner. His duty is to act as an advocate, and not to any

(t) *R. v. Edwards*, 3 Cox, 82; *R. v. Bezzel*, 4 C. & P. 220.

(u) *R. v. Colley*, Moo. & M. 329.

(v) Fitz. St. 160.

extent as a judge. He is to put himself in the place of the accused, and so is not under any obligations which the accused would not be under. Thus he is not obliged to divulge facts with which he may be acquainted which are unfavourable to the prisoner (*w*).

The rules as to examination-in-chief and cross-examination are *generally* the same, whether the witness be for the prosecution or the defence. They are based upon the supposition that the witness called and presented by the party examining him is favourable to his side, and therefore unfavourable to his opponent. If this should turn out not to be the case, the rules of cross-examination apply to the examination of one who thus proves hostile to the party producing him.

Witness supposed to be favourable to the side calling him.

Examination-in-Chief.—What questions may be put to a witness? In the first place, only such as are *relevant* to the matter in issue, and which, if answered in the way desired by the examiner, will tend to prove the offence or defence. Of course, if circumstantial evidence is resorted to, greater latitude will be allowed; inasmuch as it is not so easy to estimate the relevancy of the question.

Examination-in-chief. Questions must be relevant.

The second great rule is that *leading questions* may not be asked in examination-in-chief. What is a leading question? One which in any way suggests to the witness the answer which the person asking requires. Thus, to ask a witness, "Had the prisoner a white hat on?" would be a leading question; but the question, "What sort of a hat had the prisoner on?" would not

Leading questions not allowed.

(*w*) "The counsel for the Crown may not use arguments to prove the guilt of the prisoner which he does not himself believe to be just, and he is bound to warn the jury of objections which may diminish the weight of his arguments. In short as far as regards his own evidence, his speech should as much as possible resemble the summing up of the judge. The counsel for the prisoner may use arguments which he does not believe to be just. It is the business of the jury, after hearing the judge, to say whether or not they are just."—Fitz. St. 168.

be. Unless, indeed, the point to be proved was whether he had or had not a hat on. It is often given as a test whether a question be leading or not, whether it might be answered by "Yes" or "No." But this test is by no means decisive; all questions which may be thus answered not being leading, and other questions than those which may be so answered being equally leading. Thus the question, "Could the prisoner hear what he said?" is not leading; whereas "What did he do with the purse?" is leading, because it implies that the person to whom it relates dealt with the purse in some way or other (x). Though the rule is, that leading questions may not be put in examination-in-chief, there are certain exceptions, some allowed as of right, others for convenience' sake.

When leading questions may be asked.

(a.) For the purpose of identifying persons or things which have already been described, the attention of the witness may be directly pointed to them (y).

(b.) When a witness is called to contradict another, who has sworn to a certain fact, he may be asked in direct terms whether that fact ever took place.

(c.) When the witness is, in the opinion of the judge, hostile to the party calling him.

(d.) When the witness is unable to answer general questions from defective memory, or the complicated nature of the matter as to which he is interrogated (z).

Leading questions are also not objected to—

(a.) When merely introductory, so as to save time.

(b.) When the particular matter is not disputed. Thus, where a witness having deposed to a fact has not been cross-examined on it, questions may be put which assume that fact.

(x) Fitz. St., 280.

(y) *R. v. Watson*, 2 Starkie, N. P. C. 128.

(z) Best, Ev. 802.

A third general rule is, that the evidence of the witness must relate to what is immediately *within his knowledge and recollection*. But there is one exception to this rule. In matter of science, skill, travel, &c., the evidence of experts is allowed, that is, persons who have a special knowledge of the branch in question may be called to give their opinion as to the consequences, &c., of facts already proved. For example, if the wounds of a murdered person are described, a surgeon may be asked his opinion as to whether they caused the death; but, of course, it will be for the jury to determine how far they will adopt this opinion (a). In accordance with the general rule, a witness is not allowed to read his evidence. But he is allowed to *refresh* his memory by referring to any writing made by himself, or examined by him, soon after the event to which it refers, provided that after he has thus refreshed his memory he can swear to the fact from his own recollection.

Witness must testify from his own knowledge.

Refreshing his memory.

A fourth general rule is, that the *contents of a written document* cannot be proved orally if the document is capable of being produced, but must be proved by the document itself. But if it be shewn that it is lost, destroyed, or in possession of the prisoner who has had notice to produce it, other evidence may be given of its contents (b).

Contents of a written document, how proved.

Another matter to be noticed is the *hostility* of one's own witness. It is a rule that a counsel cannot discredit his own witness; it is also, as we have seen, a rule that leading questions may not be put in examination-in-chief. But it is provided by statute (c) that although a party producing a witness is not allowed to impeach his credit by general evidence of bad charac-

Consequences of witness proving hostile.

(a) *R. v. Wright*, R. & R. 456.

(b) *v. p.* 429.

(c) 28 Vict. c. 18, s. 3.

ter, he may, in case the witness, in the opinion of the judge, proves adverse (*i.e.*, hostile), contradict him by other evidence, or, by leave of the judge, prove that at other times he has made a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. So, also, if, in the opinion of the judge the witness is keeping back some of the truth, in order to favour the prisoner or otherwise, he may allow the cross-examining counsel to ask leading questions, and generally to *treat the witness as hostile*.

Cross-examination.

Cross-examination.—Inasmuch as a witness is supposed to be inclined to favour the party calling him, greater powers are given to the cross-examining counsel. He may ask leading questions, and in this way remind the witness of anything which may tend to help the cause of the opposite party. But if the witness proves anything favourable to the cross-examiner, the fact that the evidence was procured by leading questions will, of course, diminish its value. The counsel will not, however, be allowed to put into the witness's mouth the very words he is to echo back again (*d*). In cross-examination the questions will be of two classes: (a) Those which tend directly to refute or explain what has been given in evidence in the examination-in-chief; (b) Those whose object is to affect the credit of the witness. It is not usual to cross-examine witnesses to character except the counsel cross-examining has some distinct charge on which to cross-examine them (*e*). It is needless to add that a cross-examining counsel should avoid asking questions the answer to which, if unfavourable, would be conclu-

(*d*) *R. v. Hardy*, 24 How. St. Tr. 755.

(*e*) *R. v. Hodgkins*, 7 C. & P. 298.

sive against him. And he should always remember that the story of the witness, if true, will be confirmed the more he is questioned about it; and this although there may be slight discrepancies on immaterial points.

Re-examination.—The object of the re-examination, if it be judged expedient to have recourse to it, is to inquire into and explain what has transpired on cross-examination. But it must be strictly confined to such matter; the re-examiner may not ask questions which he might and ought to have put on examination-in-chief. Re-examination.

Any further questions after re-examination must be put through the judge; also through him any questions which occur to counsel after they have finished their examination or cross-examination (*f*). Questions put through the judge.

If any improper question, *e.g.*, irrelevant or leading, in examination-in-chief be put, the counsel on the other side should immediately interpose and object to it before the witness has time to answer it. Though in the case of a leading question this will often be ineffectual, inasmuch as the mischief has been done by the suggestion being made. The counsel in the same way should interpose if parol evidence is given when a document should be produced. Objections to questions, how made.

CHAPTER XVII.

EVIDENCE.

Definition of evidence.

" Evidence includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact the truth of which is submitted to judicial investigation " (g).

In ascertaining the law on the subject of evidence in general, four or five heads present themselves under which may be ranged the chief principles which it is necessary to consider:—

1. On whom the burden of proof lies.
2. What must be proved, and what may not be proved.
3. The best evidence must always be given.
4. Hearsay is not evidence.
5. Confessions, under certain circumstances, are not admitted as evidence.

The burden of proof, as a rule, on the prosecution.

1. The *burden of proof* is on the prosecution as a rule. The prosecution must prove their case before the prisoner is called upon for his defence; and this, although the offence alleged consists of an act of omission and not of commission, and therefore the prosecution have to resort to negative evidence (h). The law considers a man innocent until he is shewn to be

(g) 1 Tayl. Ev. 1.

(h) There is an exception to this rule when the accused pleads specially, e.g., *autrefois acquit*.

guilty. But the principle under discussion must not be understood with unlimited signification. Though the burden of proof of the charge is in general on the prosecution, yet on particular points it is on the prisoner. This is markedly the case in some offences. Thus, by various Acts of Parliament it is declared penal to do certain things, or possess certain articles, without lawful excuse or authority; such excuse or authority must be proved by the accused. For example, to possess public stores marked with the broad arrow (*i*); to possess coining tools (*j*). Again, it lies on the defendant to prove that signals to smuggling vessels were not made for the purpose of giving illegal notice (*k*); also to shew some justification for sending an unseaworthy ship to sea (*l*). But it will be noticed that in all these cases there is something to be proved in the first instance by the prosecution—either the possession of the goods, the unseaworthiness of the ship, &c.

Qualifications
of the rule as
to the *onus*
probandi.

And not only in the particular cases of which we have given examples, but in most cases of circumstantial evidence "there is a point (though it is impossible to determine exactly where it lies) at which the prosecutor has done all that he can reasonably be expected to do, and at which it is reasonable to ask for evidence from the prisoner in explanation, and to draw inferences unfavourable to him from its absence" (*m*). Thus the court will naturally expect from the prisoner an explanation of the object for which poison was purchased; so also in the case of recent possession of stolen goods. Killing is presumed to be murder until otherwise accounted for.

In some cases
an explanation
is expected
from the
prisoner.

2. *What must be proved?*—All facts and circum-
What must be proved.

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- (*i*) v. 38 & 39 Vict. c. 25.
 - (*j*) 24 & 25 Vict. c. 99, s. 24.
 - (*k*) 16 & 17 Vict. c. 107, s. 245.
 - (*l*) 38 & 39 Vict. c. 88, s. 4.
 - (*m*) Fitz. St. 303.

stances stated in the indictment which cannot be rejected as surplusage; in other words, all the constituents of the offence. Though, as we shall see hereafter, if a more serious crime contains, as it were, a less serious one, the prisoner indicted for the former may sometimes be convicted of the latter, if the more serious circumstances cannot be established; thus on an indictment for murder, if the malice prepense be not proved, the prisoner may be convicted of manslaughter.

As to time
and place.

We have seen above (*n*) in what cases the time and place must be correctly stated in the indictment (*o*); and thus we now know when they must be correctly proved. But in any case the offence must be proved to have been committed within the extent of the court's jurisdiction. Any material variance between the fact laid in the indictment and the fact proved will be fatal, unless amended (*p*).

Amendment
of variance.

Facts, &c.,
which may not
be given in
evidence.

Closely connected with the question "What must be proved?" is the question "What may not be given in evidence?" As a rule, nothing must be given in evidence which does not directly tend to prove or disprove the matter in issue. The previous or subsequent bad character of the prisoner may not be proved; unless to rebut evidence of good character (*q*). Thus, also, if other true bills are found against the prisoner, theoretically this is not supposed to influence the judge or jury (*r*). Nor may it be proved that he has a general disposition to commit the particular kind of offence. Again, it is not allowable to prove a man guilty of one felony in order to prove him guilty of another unconnected with it. In other words, if the offences are

As to other
offences.

(*n*) v. p. 338.

(*o*) v. p. 339.

(*p*) v. p. 340.

(*q*) v. *R. v. Rowton*, 34 L. J. (M.C.) 57.

(*r*) However, as both the judge and jury are supplied with *calendars*, they cannot help noticing that there are other charges against the prisoner. It would be well if the jury, at least, were not so supplied; they know perfectly well without a *calendar* what they are to give their verdict on.

distinct, evidence of one offence is, in general, inadmissible on the trial of the prisoner for another offence. But if they are connected, and form one entire transaction, other offences may be proved to shew the character of the transaction. If the evidence is admissible on general grounds as being relevant, it cannot be excluded merely because it discloses other offences (s).

There are exceptions to the rule excluding evidence of other offences :—

When evidence of other offences may be given :
In treason.

(a.) In *treason*, other overt acts may be given in evidence, if they directly prove any overt acts which are laid. And in conspiracy, sedition, libel, and similar offences, wide limits are given to the reception of evidence, inasmuch as the offence can only be estimated by the surrounding circumstances (t).

(b.) When it is necessary to prove the *guilty knowledge* of the defendant, evidence may be given of his having committed the same offence before. Thus, on an indictment for uttering forged bank notes, or for uttering counterfeit coin, evidence may be given of the defendant's having at other times uttered or had in his possession other forged bank notes or counterfeit coin. So it seems that the guilty knowledge of the falsehood of a pretence may be shewn by evidence of a previous obtaining or attempting to obtain by false pretences (u). Under the Prevention of Crimes Act, 1871 (x), when proceedings are taken against a person for *receiving* or having in his possession stolen goods, evidence may be given at any stage of the proceedings of the defendant's having had in his possession, within the preceding twelve months, other stolen property; and evidence may also be given, under the same circumstances, of his previous conviction, within five years, of any offence involving fraud or dishonesty.

To prove guilty knowledge.
In cases of receiving.

(s) Rosc. 92; v. *R. v. Salisbury*, 5 C. & P. 155.

(t) v. *R. v. Hunt*, 3 B. & Ald. 566; *R. v. Pierce, Peake*, 75.

(u) *R. v. Francis*, L. R. 2 C. C. R. 128; 43 L. J. (M.C.) 97.

(x) 34 & 35 Vict. c. 112, s. 19.

To shew
intent.

(c.) When it is necessary to prove *malice* or *intent* on the part of the defendant, evidence of other offences may, under some circumstances, be given. Thus, in a trial for murder, evidence of former unsuccessful attempts or threats to murder would be admissible.

Evidence
of good
character :

As to evidence of *good character*.—Witness may be called to speak generally to the good character of the prisoner; but they may not give evidence of particular acts, unless such evidence tends directly to the disproving of some of the facts put in issue by the pleadings. The evidence must be to the general reputation for good character, and not to the witness's own opinion. The way in which the information is elicited is by questions of this sort: "How long have you known the prisoner?" "During that time, what has been his general character for sobriety, honesty, and industry?"

of bad
character.

General evidence of good character may be disproved by general evidence of bad character; but not by particular cases of misconduct. However for such purposes, previous convictions may as a rule be proved (y).

Effect of
evidence of
character.

It is important to notice in what way evidence of previous good character operates: "Judges frequently tell juries that evidence of character cannot be of use when the case is clearly proved, except in mitigation (or, possibly, aggravation) of punishment; but, that if they have any doubt, evidence of character is highly important" (z).

(y) v. 6 & 7 Wm. 4, c. 111; 24 & 25 Vict. c. 96, s. 116; 24 & 25 Vict. c. 99, s. 37.

(z) Fitz. St. 312. "This always seems to me to be equivalent to saying, 'If you think the prisoner guilty, say so; and if you think you ought to acquit him independently of the evidence of character, acquit him rather more readily because of it.' Evidence of character would thus be superfluous in every case. The true distinction is, that evidence of character may explain conduct, but cannot alter facts. I do not disbelieve a credible witness because the man whose hand he swears he saw in his neighbour's pocket has a very high character for honesty; but I do not draw the inference from the fact which I should draw in most cases, namely, that there existed a felonious intent. I ascribe the act to some innocent motive."—Ibid.

3. The *best evidence* must always be given. That is if it is possible to be had ; if not, then inferior evidence will be admitted. But before this inferior (or *secondary*) evidence is let in, the absence of the better evidence must be accounted for. By this is meant that merely substitutionary evidence, that is such as indicates more original sources of information, must not be received so long as the original evidence is attainable. It does not imply that weaker proofs (which are not substitutionary) may not be selected instead of stronger ones. Thus, an act may be equally proved by a written instrument, and also by some one who saw it ; both these modes of proof are primary. Best evidence must be given.

The most common application of this rule is in the case of written instruments. It is plain that the best evidence of the contents of a written document is the writing itself, and therefore before a copy, or parol evidence of its contents can be received, the absence of the original instrument must be accounted for by proving that it is lost or destroyed, or that it is in the possession of the opposite party, and that he has had reasonable notice to produce it. If once secondary evidence is admitted, any proof may be given, as there are no degrees of secondary evidence ; thus, if an original deed cannot be produced, parol evidence of its contents may be given, although there is an attested copy in existence. But for the sake of convenience, copies may be given, in evidence of all records, other than those of the court requiring proof of them, of journals of either House of Parliament, and generally of the official documents of other courts, and parish registers, entries in corporation books and books of public companies relating to things public and general. The case of written documents.

Entries in bankers' books may be proved by examined copies verified on oath or by affidavit (a).

(a) Banker's Books Evidence Act, 1879, 42 Vict. c. 11.

4. *Hearsay is no evidence.*

Hearsay,
no evidence.

Hearsay (*derivative*, or *second-hand*, as opposed to *secondary*) evidence is that which is learnt from some one else, whether by word of mouth or otherwise; in other words, it is anything which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person (*b*).

Hearsay,
why rejected.

The reasons usually assigned for the rejection of hearsay evidence are two: (a) that the original statement or writing was not made on oath; (b) that the party affected has not the opportunity of cross-examining the originator of it. Its reception would also have the effect of lengthening the proceedings without any corresponding advantage. We have seen that secondary evidence can be given only where there has been an explanation of the absence of the best evidence; secondhand evidence cannot be given at all, subject to the following exceptions (*c*):—

When it may
be given in
evidence.

- i. To prove the death of a person beyond the sea.
- ii. To prove a prescription, a custom; matters of pedigree; reputation on questions of public or general right.
- iii. When the hearsay is what the witness has been heard to say at another time, in order to invalidate or confirm his testimony given in court.
- iv. Declarations made by persons under the sensible conviction of their impending death. Such declarations are admitted only when the death of the deceased is the subject of the charge (that is, in cases of murder or manslaughter), and only if the declaration refers to the injury which is the cause of death.

(b) 1 Ph. Ev. 185.

(c) "All the exceptions to the rule are based upon the principle that the special circumstances which establish them supply a sanction to the statement and exclude the possibility of calling the person who made it."—Fitz. St. 319.

v. Statements made by deceased persons, if against their interest; or entries made by them in the regular course of their duty or employment.

vi. When the bodily or mental feelings of a person are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible as original evidence (*d*); for example, what was said to a surgeon immediately after an assault (*e*).

vii. When the sayings, &c., of another are part of the *res gestæ*, that is, of the general transaction, and are not merely a medium of proof of another fact. Thus, the cries of a person being stabbed, of a mob, are good evidence (*f*). In fact, these are not strictly instances of hearsay evidence at all, but the original proofs of what took place.

It will be convenient here to notice the rule that if a witness is dead, or too ill to travel (or kept out of the way, as against the person so keeping him out) (*g*), his depositions may be read, provided that such depositions were taken in the presence of the accused, and that he had an opportunity of cross-examining the witness (*h*).

Depositions of ill or deceased persons may be read at the trial.

5. *Confessions*, under certain circumstances, are not admitted as evidence. Confessions,

Confessions, if received at all in evidence, are received with great caution, not only from the consideration that, owing to insanity or other reason, they may be false, but also there is the danger of their not having been correctly reported. The general rule is, that to be admissible they must be free and voluntary. What

when admitted in evidence.

(*d*) 1 Tayl. Ev. 496.

(*e*) *Aveson v. Lord Kinnaird*, 6 East, 198.

(*f*) v. 21 How. St. Tr. 514, 529.

(*g*) *R. v. Scayfe*, 2 Den. 281.

(*h*) 11 & 12 Vict. c. 42, s. 17. So, also, as to depositions on behalf of the accused, 30 & 31 Vict. c. 35, s. 3.

amounts to a free and voluntary confession does not clearly appear. "Thus much is certain, that no confession by the prisoner is admissible which is made in consequence of any inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority; and on the whole, the tendency of the present decisions seems to be to admit any confessions which do not come within this proposition" (i).

Against whom
confessions are
admitted in
evidence.

Confessionary evidence is admissible only against the person who makes it, though, of course, if the jury hear anything in it against accomplices, it will be apt to prejudice them against such co-defendants. In the same way, if a confession is improperly blurted out where it is not admissible, it cannot but have weight with the jury.

Confessions
before
magistrates.

With regard to confessions or statements before the magistrate, it is provided by statute (j) that after the examination of all the witnesses for the prosecution, one of the magistrates shall have all the depositions against the accused read to him, and shall then say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial." The magistrate gives a further caution that the accused has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to induce him to make any confession or admission of his guilt. But this second caution is necessary only when it appears that some inducement has been holden out to the accused (k). The statement of the prisoner

(i) *Rosc.* 41. See also *R. v. Fennell*, 7 Q. B. D. 147; 50 L. J. (M.C.) 126; 44 L. T. (N.S.) 687; 29 W. R. 742.

(j) 11 & 12 Vict. c. 42, s. 18.

(k) *R. v. Sansome*, 19 L. J. (M.C.) 143.

thus made before the magistrate is read at the trial from the depositions without further proof.

It will be remembered that a witness is not compelled to answer questions which tend to criminate himself. By several statutes, though they are obliged to answer the questions, the evidence given by witnesses is expressly declared not available against them on a criminal charge, for example, under the Corrupt Practices Prevention Act, 1863 (*l*). Witness not bound to criminate himself.

CIRCUMSTANTIAL AND PRESUMPTIVE EVIDENCE.

It is usual to distinguish two kinds of evidence, *Direct or Positive, Circumstantial or Presumptive*. By the former we mean the evidence given by a person who testifies to having actually seen, &c., the act constituting the crime committed; the proof applying immediately to the *factum probandum*, without any intervening process. All other evidence is termed indirect, presumptive, or circumstantial; being evidence of facts from which the fact of the crime may be inferred; it applies to collateral facts which contribute to the conclusion that the principal fact exists. Thus, if a witness proves that he saw the prisoner cut A.'s throat, or put his hand into B.'s pocket, draw out his purse, and run away, the evidence is direct. But if the witness proves that the prisoner was seen going to B.'s house at 4 o'clock, that there was no other person in the house at the time, that at 4.15 B.'s throat was found cut, and that a blood-stained knife was found concealed in B.'s locked box, the evidence is circumstantial. Circumstantial distinguished from direct evidence.

It is difficult to draw the line between direct and circumstantial evidence. This will be seen more readily from an example. A. stabs B. in three places; Fineness of the distinction.

(*l*) 26 Vict. c. 29, s. 7. For other examples, v. Tayl. Ev. 1226.

it is not known in consequence of which of the wounds death ensues. C. sees A.'s hand raised to strike one of these blows. Is his evidence to be regarded as direct or circumstantial as to the murder? In other words, it is often impossible to draw the line between the principal fact and subsidiary facts (*m*). And if it were possible clearly to distinguish, what would be the advantage? It is certainly incorrect to say that direct is stronger than circumstantial evidence. It may be that in the former there is not the danger involved in drawing the inferences which are incidental to the latter; but, on the other hand, in the latter more facts are brought on the carpet by a greater number of witnesses, and thereby any mistake is much more likely to be exposed (*n*).

Circumstantial evidence, conclusive or presumptive.

The so-called circumstantial evidence is said to be of two kinds:—

Conclusive, when the connection between the prin-

(*m*) "It is impossible to say specifically of any crime which is the principal fact. In murder, is the principal fact the conception of malice in the mind, or the infliction of bodily injury, or the death in consequence? Unless all these take place there is no murder. These facts may occur at times and places remote from each other. Are there three principal facts?"—Fitz. St. 267.

(*n*) "There is no sort of difference between the cogency of the different kinds of evidence, whether the comparison is made between weak cases or strong ones. Compare two strong cases. How is it possible to say whether the evidence of several credible witnesses, who say they saw a man put his hand into another man's pocket, and take out his purse and run away, is stronger or weaker than that of the same number of equally respectable witnesses who prove that the purse was taken, and that immediately afterwards the prisoner was seen running away, and on being stopped was found to have the purse in a secret pocket, no explanation being given? Or take two weak cases. A man swears that he was robbed on a dark night, and that the prisoner is the man who robbed him. The light by which he saw him was the reflection of a furnace a long way off, which would cast a light at once strong and unsteady, and the robber was exposed to it only for a moment. A sack is stolen, and is found three months afterwards, apparently concealed, in the house of a marine store dealer. He says something on the subject which may be, and probably is, a lie. Other people had access to the place where the sack was found. Which of these cases is the stronger of the two? Their relative strength cannot be shewn to depend in any way on the properties of either direct or circumstantial evidence as such." . . . Circumstantial "is, in short, a word useful only for the sake of puzzling juries, and providing them with a loophole for avoiding a painful but most important duty."—Fitz. St. 273.

cial and evidentiary facts is a necessary consequence of the laws of nature; as in an *alibi*.

Presumptive, when it only rests on a greater or less degree of probability (*o*). Such evidence is termed "presumptive," inasmuch as the fact of the crime is to be presumed from certain other facts.

Presumptions, or inferences of other facts from facts which are already admitted or proved, are sometimes divided into violent, probable, slight or rash, according as the facts presumed necessarily, usually or otherwise attend the fact proved. A more scientific classification is into Presumptions:—

Presumptions
classified.

- i. *Juris et de jure*.
- ii. *Juris*.
- iii. *Facti* or *nominis*.

The last of these is the kind of presumption produced by evidence in the way we have noticed. The other two must be explained:—

i. *Juris et de jure*.—Presumptions of this character are absolute, conclusive, and irrebutable. No evidence is allowed to be given to the contrary. For example, an infant under the age of seven is incapable of committing a felony. Every person knows the law.

Presumptio
juris et de jure.

ii. *Juris*.—Presumptions which are conditional, inconclusive, and rebuttable. They only hold good until the contrary is proved. For example, a child between the age of seven and fourteen is presumed to be incapable of committing a felony; but only till it is proved that he had a mischievous discretion. A person is presumed to be innocent till he is shewn to be guilty. Malice is presumed from the act of killing, unless its absence be shewn.

Presumptio
juris.

WRITTEN EVIDENCE.

Written
evidence.

Written documents may be divided into three classes; differing as to the manner in which they must be given in evidence and proved:—

i. Records.

ii. Matters *quasi* of record.

iii. Written documents of a private nature.

Acts of
Parliament.

i. *Records*.—First, as to Acts of Parliament. Public statutes do not need any proof; the court is bound judicially to take notice of them. And all Acts passed since February 4th, 1851, are to be taken as public Acts unless the contrary be expressly provided (*p*). Private Acts must be proved by an examined copy of the parliament roll; or by a copy purporting to be printed by the Queen's printers. As regards proof, general customs of the realm are on the footing of public Acts; particular customs on that of private Acts.

Other records.

As to other records.—Inasmuch as the records of the various courts are frequently required to be given in evidence, perhaps in two places at the same time, and thus inconvenience would arise, as well as the danger of destruction or loss; and inasmuch as the whole community is interested in their preservation, alteration is not to be feared, the production of the originals is not required (*g*). Their place is supplied by an exemplification of the record under the Great Seal, or under the seal of the court, or by a copy sworn to be true by a person who has compared it with the original. But a mere copy will not suffice if the matter of the record forms the gist of the pleading, *e.g.*, on a plea of *autrefois acquit*. A copy of a copy will never suffice.

(*p*) 13 & 14 Vict. c. 21, ss. 7, 8.
(*g*) v. Best, Ev. 618.

In certain cases not even a copy of the whole record is required. Thus to prove a previous conviction or acquittal, it is sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment, or acquittal, as the case may be, omitting the formal parts thereof (*r*). And further, it has been provided that a previous conviction may be proved in any legal proceeding by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract in the case of an indictable offence is explained to be a certificate of the indictment and conviction of the nature of that described in 14 & 15 Vict. c. 99, s. 13; and in case of a summary conviction consists of a copy of the conviction, purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned. And there is no need to prove the signature or official character of the person whose signature appears (*s*).

ii. *Matters quasi of record*.—Without going into detail, it may be said generally that the proceedings, not being records, of any of the divisions of the High Court, or of the ecclesiastical courts, may be proved by

(*r*) 14 & 15 Vict. c. 99, s. 13. See also 7 & 8 Geo. 4, c. 28, s. 11; 24 & 25 Vict. c. 96, s. 116; c. 97, s. 70; c. 99, s. 37.

(*s*) 34 & 35 Vict. c. 112, s. 18.

copies. In county courts the proceedings are to be proved by an entry in the clerk's book, or a copy bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court (*t*). In other inferior courts the proof is by producing the books in which the entry has been made, or by an examined copy. In bankruptcy, a copy of the *Gazette* containing an adjudication of bankruptcy is conclusive evidence of the bankruptcy (*u*).

Perpetuating
the testimony
of deceased,
&c.

We have already noticed the provision which is made for the reading of the depositions for or against the prisoner in the case of a witness who is dead or too ill to travel (*x*). To perpetuate the testimony which can be given by a person whose death is apprehended, it is provided that—if it appear to some justice of the peace, and in the opinion of a registered medical practitioner, that some person is not likely to recover, and is able to give material information relating to an indictable offence, and it be not practicable to take the depositions in the ordinary way—the justice may take in writing the statement on oath or affirmation of the person who is ill, opportunity being given to the other party (prosecution or accused) to cross-examine the deponent. Having observed the formalities prescribed by the statute, such depositions are transmitted to the proper quarter. And if on the trial of the offender it is proved that the deponent is dead, or will not in all probability ever be able to travel or give evidence, the statement may be read in evidence (*y*).

A declaration made under a belief of impending death is admissible in evidence, even though the declarant, at a later period of the day, took a more

(*t*) 9 & 10 Vict. c. 95, s. 111.

(*u*) 32 & 33 Vict. c. 71, s. 10. See also Arch. 272-274.

(*x*) v. p. 431.

(*y*) 30 & 31 Vict. c. 35, s. 6.

cheerful view of her position, and thought that she should recover (z).

iii. *Written documents of a private nature.*—As to *deeds*.—As a general rule if they are to be given in evidence, they must be produced themselves at the trial. But in cases of accidental loss, and others arising from necessity, the contents may be proved by copies or other secondary evidence. And so also if other written documents are lost, secondary evidence may be received, if the genuineness of the original instrument is proved at the same time (a). Deeds, &c.,
how proved.

The manner of the proof of the execution of deeds and other written instruments is the same. If the instrument is one to the validity of which attestation is requisite, it must be proved by a subscribing witness. But to this rule there are several exceptions, for example, if the witness be dead, insane, &c. (b). But if the instrument is not one which requires attestation, even though it be actually attested, it need not be proved by the attesting witness (c), but may be proved by simple proof of the party's handwriting.

Handwriting may be proved in several ways:—

Handwriting,
how proved.

(a) By one who has seen the party write (*ex visu scriptio*).

(b) By one who has carried on a correspondence, or had other opportunities of getting acquainted with his writing (*ex scriptis olim visis*).

(z) *R. v. Hubbard*, 14 Cox, 565.

(a) v. p. 429.

(b) v. *Arch.* 292, 293.

(c) 28 Vict. c. 18, s. 7.

(c.) By comparison with documents known and admitted to be in the handwriting of the party (*ex scripto nunc viso*, or *ex comparatione scriptorum*). It is provided by statute that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute (*d*).

Points in which rules of evidence in civil and in criminal cases differ.

It may be useful to notice the chief points in which differences exist between the rules of evidence in civil and criminal cases (*e*):—

1. In the latter in some cases more than one witness is required (*f*).

2. Confessions — when admitted — when conclusive (*g*).

3. A party to a cause may be a witness, but a prisoner on his trial may not (*h*).

4. The husband or wife of a party in a civil action may give evidence for or against his consort; but as a rule, such evidence is excluded in criminal cases (*i*).

(*d*) Ibid. s. 8.

(*e*) v. 4 St. Bl. 426.

(*f*) v. p. 412.

(*g*) v. p. 431.

(*h*) On an application for sureties to keep the peace before a court of summary jurisdiction, both the complainant and the defendant may be called as witnesses. Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 25.

A person charged with an offence under the Army Discipline Act, 1879, s. 149, or the wife or husband of such person, may be a witness. v. pp. 63, 404, 406.

(*i*) v. p. 405. By 40 Vict. c. 14, a defendant, and the wife or husband of a defendant, is made admissible and compellable to give evidence on the trial of an indictment or proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge; and of any other indictment or proceeding for the purposes of trying or enforcing a civil right only. v. also p. 406.

5. The use of the depositions of witnesses prevented from attending in person (*j*); and their use to contradict the witness at the trial itself (*k*).

6. In cases of homicide, the dying declaration of the deceased is admitted in evidence as to the cause of death (*l*).

7. Witnesses to character are allowed in criminal cases.

(*j*) v. p. 431.

(*k*) v. p. 410.

(*l*) v. p. 430.

CHAPTER XVIII

VERDICT.

Verdict, how
arrived at, and
how given.

WE have already considered the province of the jury, and the opportunities afforded to them for considering their verdict. In order to clear up any difficulties, they may ask the opinion of the judge on any point which is not exclusively for their determination; or may have read over to them by the judge any part of the evidence; or through the judge, in court, may ask any additional question of any witness. If they cannot after a reasonable time agree upon their verdict, they are discharged (*m*); the prisoner, of course, being liable to be tried again. Before finding the prisoner guilty, they must be unanimous in believing that there is no reasonable doubt of his guilt, not necessarily that there is no other possible explanation. If they do all agree, on coming into court again, if they have retired, they answer to their names. The clerk of the assizes, clerk of the peace, or other officer, thus addresses them—"Gentlemen, have you agreed upon your verdict?" "How say you, do you find John Styles guilty or not guilty?" They deliver their verdict through the foreman. In treason or felony the prisoner must be present when this is done; but not necessarily in misdemeanor.

Verdicts,
general,
partial, or
special.

Verdicts in criminal cases may be distinguished into:—

General—i.e., "guilty" or "not guilty" on the whole charge.

(*m*) v. p. 393 as to discharge on account of death, &c., of juror.

Partial—as when the jury convict on one or more counts of the indictment and acquit on the rest.

Special—when the facts of the case as found by the jury are set forth, but the court is desired to draw the legal inference from the facts, for example, whether they amount to murder or manslaughter.

The jury may acquit one of several co-defendants who are joined in the same indictment and convict the others, and *vice versa* ; even though charged with jointly receiving (n). But in cases where to constitute the crime it is necessary that a certain number should join in it, if so many are acquitted that less than the requisite number are left, these also must be acquitted—thus, three are necessary for a riot, two for a conspiracy.

Verdict if there are several defendants.

A person charged with a felony or misdemeanor may be found guilty of an *attempt* to commit the same offence (o), the same consequences following as if he had been in the first instance charged with the attempt only.

Verdict of attempt.

Upon an indictment for a misdemeanor, if the facts given in evidence amount to a felony, the prisoner is not on that account to be acquitted of the misdemeanor, unless the court thinks fit to discharge the jury and to order the defendant to be indicted for the felony (p).

Verdict of misdemeanor, though facts amount to felony.

Upon an indictment for *robbery*, the prisoner may be found guilty of an *assault with intent* to rob (q).

Cases in which verdict is for crime not charged in indictment.

Upon an indictment for *larceny*, the prisoner may be found guilty of *embezzlement*, and *vice versa* (r).

(n) 24 & 25 Vict. c. 99, s. 94.

(o) 14 & 15 Vict. c. 100, s. 9.

(p) *Ibid.* s. 12.

(q) 24 & 25 Vict. c. 96, s. 41.

(r) *Ibid.* s. 72.

Upon an indictment for obtaining by *false pretences*, if the offence turns out to amount to *larceny*, the defendant may still be convicted of false pretences (*s*).

And whenever a person is indicted for an offence which includes in it an offence of minor extent and gravity of the same class, the prisoner may be convicted of such minor offence (*t*). Thus, on an indictment for murder, he may be convicted of manslaughter; so of simple larceny, if indicted for stealing in a dwelling-house, or any other aggravated form of larceny (*u*).

Verdict
objected to
by the judge.

If the judge is dissatisfied with the verdict he may direct the jury to reconsider it, and their subsequent verdict will stand as the true one. If, however, the jury insist upon having the first recorded, it must be recorded; but if it be a verdict of guilty, and contrary to the evidence, it will be set aside and a new trial granted by the Queen's Bench Division (*v*).

Acquittal, consequences of.

If a verdict of acquittal is returned, the prisoner is for ever free from the present accusation; and he is discharged in due course, unless there is some other charge against him. If he is acquitted on account of some defect in the proceedings, or not, as above, on the merits of the case, he may be detained and indicted afresh. If he is acquitted on the ground of insanity at the time of the commission of the offence, whether such offence was a felony (*x*) or misdemeanor (*y*), he must be kept in custody until the Queen's pleasure be known; and the Queen may order his confinement during her pleasure (*z*).

(*s*) 24 & 25 Vict. c. 96, s. 88; v. p. 242.

(*t*) v. Rosc. 84.

(*u*) v. Arch. 229.

(*v*) v. p. 467.

(*x*) 39 & 40 Geo. 3, c. 94, s. 1.

(*y*) 3 & 4 Vict. c. 54, s. 3.

(*z*) v. p. 372 as to insanity at time of trial and not of commission of offence.

If a verdict of guilty is brought in, the accused is said to be convicted. The jury may annex to such verdict a recommendation to mercy on any grounds they think proper—which recommendation will usually be taken into consideration by the judge (a). If there are several counts in the indictment the verdict specifies on which count the prisoner is convicted.

If there is a second indictment against a prisoner who has been found guilty, frequently it is not proceeded with if the charge is similar to that on which he has just been convicted. The counsel for the prosecution often merely gives the court an outline of the case. If he is acquitted, the second indictment is then proceeded with, unless it is obvious that there is no more evidence than in the first case.

If a prisoner indicted for any felony or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or of obtaining goods or money by false pretences, or of conspiracy to defraud, or of any misdemeanor under 24 & 25 Vict. c. 96, s. 58 (b), has been found guilty, then, if he has been previously convicted of any of the above crimes, he is asked whether he has been so previously convicted, the previous conviction being also alleged in the indictment. If he admits it, the court proceeds to sentence him. But if he denies it, or will not answer, the jury are then, without being again sworn, charged to inquire concerning such previous conviction; the point to be established being the identification of the accused with the person so convicted (c). The only case in which

(a) Unless, indeed, as is not unfrequently the case, it appears that the recommendation is founded on some lingering doubt as to the sufficiency of the evidence.

(b) v. p. 255.

(c) 34 & 35 Vict. c. 112, ss. 18, 20; see also 24 & 25 Vict. c. 96, s. 116; c. 97, s. 37.

evidence of a previous conviction may be given before the subsequent conviction is found is when the prisoner gives evidence of character. In this case the jury are to inquire of the previous conviction and the subsequent offence at the same time (*d*).

(*d*) Though the previous conviction does not fall within the scope of the above provision, the judge has before him a record of it and all other occasions on which the accused has been before a criminal court. See p. 229, as to evidence of certain previous convictions on an indictment for receiving.

CHAPTER XIX.

JUDGMENT.

BEFORE judgment in cases of treason and felony, the Judgment. prisoner is supposed to be asked whether he has anything to say why the court should not proceed to pass sentence upon him. But in actual practice this is not always done.

The interval between conviction and judgment is the Arrest of time for the defendant to move the court in *arrest of judgment.* judgment. This motion must be grounded on some defect apparent on the face of the record, and not on some irregularity in the proceedings. The objection must be a substantial one, such as want of sufficient certainty in the indictment as to the statement of facts, &c. But judgment will not be arrested if the defect has been amended during the trial, or is such an one as is aided by verdict. The court itself will arrest judgment if it is satisfied that the defendant has not been found guilty of an offence in law. If judgment is arrested, the proceedings are set aside, no judgment is given, and the prisoner is discharged. But, unlike an ordinary acquittal, the defendant may be indicted again on the same facts.

Judgment may be postponed if the court wishes to Judgment reserve any point of law for the consideration of the postponed. Court for Crown Cases Reserved (e).

If the defendant has been found guilty of a mis- Verdict in
 _____ absence of
 prisoner.

demeanor in his absence (in felonies he must be present), process issues to bring him to receive judgment; and on non-appearance he may be prosecuted to outlawry (*f*). If he has been allowed to leave the court on entering into recognizances to come up for judgment when called upon, and he fails to come up, his recognizances will be forfeited and a warrant issued for his apprehension.

Giving
judgment.

Judgment or sentence is given by the court, the judge adding such remarks as he thinks proper. Formerly, in all capital felonies, when the court thought that the person convicted was a fit subject for royal mercy, it was lawful, instead of publicly giving sentence of death, to enter it on the record, the effect being the same (*g*). But it seems that now, by virtue of 24 & 25 Vict. c. 100, s. 2, sentence of death must be pronounced on conviction for murder.

(*f*) v. p. 361.

(*g*) v. 4 Geo. 4, c. 48, s. 1; 6 & 7 Wm. 4, c. 30, s. 2; 24 & 25 Vict. c. 95.

CHAPTER XX.

INCIDENTS OF TRIAL.

SOME miscellaneous points connected with a criminal trial remain to be noticed, now that we have viewed the general order of proceedings.

Defence in formâ pauperis.—In cases of extreme poverty (that is, when the defendant will swear that he is not worth £5 in the world, besides his wearing apparel, after paying his debts) the defendant may petition the Queen's Bench Division to be allowed to defend himself as a pauper. His petition must be verified at the same time by an affidavit. It (the petition) is presented either to a judge at chambers or in court. On the prayer of the petition being granted, a rule is drawn up by the judge's clerk, mentioning the name of the counsel and attorney assigned for the defence; and this must be produced when the pauper requires anything to be done without payment of fees (*h*).

There is also a custom of a similar nature. In cases where there is a special difficulty, or where the consequences are very serious, and therefore usually on indictments for murder, if the prisoner is not defended by counsel, the judge requests some barrister to give his honorary services to the prisoner. Of course, this request is always complied with.

Sometimes a poor person is allowed to prosecute *in formâ pauperis*, but then, in addition to the petition

*Defence in
formâ pau-
peris.*

*Defence at the
request of
the judge.*

*Prosecution
in formâ pau-
peris.*

(*h*) Arch. 155. *R. v. Dugdale*, Corner's Cr. Prac. 167.

and affidavit, there must be special grounds shewn for allowing this irregularity (i).

View of locus
in quo.

View of locus in quo by the jury.—The judge may allow the jury to view the scene of the crime, or other occurrence under investigation, at any time during the trial, even after the summing-up. But care should be taken that no improper communications are made at the view ; and that no evidence is received in the absence of the judge and the prisoner (k).

Adjournment
of trial.

Adjournment of the trial.—If the trial is not concluded on the same day on which it is commenced, the judge may adjourn from day to day (l). And a judge may adjourn a case and proceed with another if the emergency requires it, as, for example, to give time for the production of something essential to the proof, or for the witnesses to arrive (m). If the prisoner is taken so ill as to render him incapable of remaining at the bar, the jury is discharged, and the prisoner is afterwards tried by another jury (n).

Withdrawal
from prosecu-
tion.

Withdrawal from prosecution.—Frequently the prosecutor is desirous of withdrawing from the prosecution, the accused engaging not to bring an action for trespass and false imprisonment or malicious prosecution. If the offence is a misdemeanor more immediately affecting the individual, e.g., a battery, or, in other words, one which might be made the subject of civil action, this will be allowed, and the agreement will be enforced ; but not if the offence is a felony or a misdemeanor of a more public nature (o). Even after verdict, if the court deems such a course proper, the defendant

(i) Arch. 156. *R. v. Wilkins*, 1 Dowl. P. C. 536.

(k) *R. v. Martin*, L. R. 1 C. C. R. 378 ; 41 L. J. (M.C.) 113.

(l) As to what happens to the jury in the interval, v. p. 393.

(m) *R. v. Wemborn*, 6 Jur. 267.

(n) *R. v. Stevenson*, 2 Leach, 546.

(o) *v. Rawlings v. Coal Consumers' Association*, 43 L. J. (M.C.) 111.

is sometimes allowed to "talk with the prosecutor." Though one person is not obliged in the first instance to prosecute another whom he suspects of crime, that is, not until he has been bound over by the magistrate to prosecute and give evidence, it is a crime to take a reward not to prosecute a felony (*p*).

Restitution of goods.—When a man's goods have been stolen, he may, if he can do so without a breach of the peace, retake them wherever he finds them (*q*), as the goods are still his, unless they have been sold and bought in market overt, by which sale a *bona fide* purchaser acquires the property in the goods. In that case the original owner is entitled to have his goods back only after he has prosecuted the thief to conviction; and that only in consequence of the provisions of the Larceny Consolidation Act. Restitution of goods.

If any person guilty of any such felony or misdemeanor as is mentioned in that Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security or other property, is indicted for such offence by or on behalf of the owner of the property, or his executors, or administrators, and convicted thereof; in such case the property is to be restored to the owner or his representative. The court may order the restitution in a summary manner. But no such restitution is made if it appears that any valuable security has been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, has been *bona fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, &c. But the above pro-

(*p*) v. compounding felony, p. 98.
 (*q*) 4 Bl. 363.

visions as to restitution do not apply to the case of any prosecution of any trustee, banker, merchant, solicitor, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods, for any misdemeanor against the Larceny Act (r). But the court has not power, as a rule, to order property not forming part of the subject of the indictment, for example, property found on the prisoner, to be disposed of in a particular manner (s).

Effect of
the statute.

The effect of this statute is to revest the property in the goods in the original owner from the time of the conviction, so that he may bring an action to recover his goods against any one who had possession of them after the conviction (t), but not against a person who, having bought them in market overt, parted with them before such conviction (u). Or the owner may obtain a summary order for restitution under the statute.

Goods
obtained by
false pretences.

Now as we have seen that there is a distinction, in the case of goods which have been stolen and afterwards sold, between a sale in market overt and a sale otherwise, on which depends the right to recover by the aid of the statute only, or without it; so similarly with regard to goods which have been obtained from the owner by false pretences, different considerations apply according as the property has or has not passed from the original owner.

Thus, for example, when A. is induced by fraud to part with his goods to B., under the belief that he is selling the goods to some person whom B. pretends to be, or to be the agent of, the contract is void, and the

(r) 24 & 25 Vict. c. 96, s. 100.

(s) *R. v. Corporation of London*, 27 L. J. (M.C.) 231. But an exception is introduced by statute 30 & 31 Vict. c. 35, s. 9.

(t) *Scattergood v. Sylvester*, 15 Q. B. 506.

(u) *Horwood v. Smith*, 2 T. R. 750.

property in the goods has never passed from A., and he is therefore entitled, apart from the statute, to recover his goods, or sue for the conversion of them (*x*). But when A. has been induced by fraud to sell or part with his goods to B., intending to pass the property to him, the contract is not void, but voidable; i.e., A. may repudiate the contract on discovering the fraud, and may recover the goods from B., or from a purchaser who had notice of the fraud. But if B. has sold the goods to C., an innocent purchaser, A. cannot recover the goods from C., because the property in the goods passed to him while B. had the property, and so C. has acquired a good title, unless the statute gives A. the right to recover.

The words of the statute seem to have that effect, and were so considered by Blackburn, J., in *Lindsay v. Cundy* (*y*). And it is difficult to see any reason why a person who has bought in market overt *bonâ fide*, but from a thief, should be in a worse position than one who has simply purchased from one who has obtained the goods by fraud. However, it has been decided, in the recent case of *Moyce v. Newington* (*z*), that the statute does not apply to cases of false pretences where the property has passed, but only to those cases where possession has been obtained without the property passing, cases in which, as we have seen, the statute is unnecessary, except for the purpose of giving a summary mode of obtaining restitution.

The innocent purchaser is not, however, always a total loser; for it is provided that money found on a prisoner, who has been convicted of an offence which includes the stealing of any property, may be ordered by

Remedy of
innocent pur-
chaser.

(*x*) *Hardman v. Booth*, 1 H. & C. 803; 32 L. J. (Ex.) 105; *Lindsay v. Cundy*, L. R. 1 Q. B. D. 348; 45 L. J. (Q.B.) 381; L. R. 2 Q. B. D. 96; 46 L. J. (Q.B.) 233; L. R. 3, Appeal Cases, 459; 47 L. J. (H.L.) 481.

(*y*) L. R. 1 Q. B. D. 357.

(*z*) L. R. 4 Q. B. D. 32; 48 L. J. (Q.B.) 125.

the court to be given to the purchaser of the property, if he did not know that the same was stolen. This takes place only after he has restored the property to the owner; and of course the amount so given must not exceed the amount of the proceeds of the sale (a). If the property has been pawned, the court may order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment of any part, as the court, according to the conduct of the owner and the other circumstances of the case, thinks just and fitting (b).

Restitution
ordered by a
magistrate.

Restitution may be ordered in the same way by magistrates convicting of larceny, &c., in the exercise of their summary jurisdiction (c).

(a) 30 & 31 Vict. c. 35, s. 9.

(b) 35 & 36 Vict. c. 93, s. 30.

(c) 42 & 43 Vict. c. 49, s. 27, subs. 3.

CHAPTER XXI.

PUNISHMENT.

THE object of the sentence is to prescribe the punishment. The law, whether common law or statute law, which assigns the punishment, almost unexceptionally gives the judge a certain latitude as to the amount of punishment. Though he is restricted as to the maximum, in almost every case he can give as little as he pleases, minimum punishments having been abolished by statute (*d*). On conviction for treason or murder, however, sentence of death must be passed (*e*). Crimes against nature must be punished by at least ten years penal servitude. Some crimes demand a wide limit of punishment; for example, manslaughter, where it may range from penal servitude for life to a merely nominal punishment, according to the circumstances. But practically this works well, as the judges are quite competent to apportion the punishment to the crime; and the inconvenience of reposing that confidence in them is a less evil than the multiplication of technical distinctions which inevitably results from the multiplication of the definitions of crime (*f*).

The punishment prescribed by statute for *felonies* is usually penal servitude for not less than five years, or imprisonment not exceeding two years, with or without hard labour. When the punishment is not prescribed by statute, the combined effect of several

(*d*) 9 & 10 Vict. c. 24.

(*e*) v. p. 276 for two offences anomalously capital.

(*f*) v. Fitz. St. 143.

statutes (*g*) is, that such felonies may be punished by penal servitude for not more than seven nor less than five years, or by imprisonment for any term not exceeding two years; and, if a male, the court may order the felon to be once, twice, or thrice publicly or privately whipped in addition to such punishment.

Usual punishment for misdemeanors.

The punishment prescribed by statute for *misdemeanors* is usually fine or imprisonment, or both; and it is also the same when it is not prescribed by statute, but left to the common law (*h*). The court may also require the defendant to find sureties to keep the peace and be of good behaviour.

Punishment after previous conviction.

The punishment for a felony (not punishable with death and not being simple larceny), after a previous conviction for felony, is penal servitude for life or for not less than five years, or imprisonment not exceeding four years; and in the case of a male, if the court thinks fit, whipping publicly or privately, once, twice, or thrice (*i*).

Simple larceny after previous conviction.

Special enactments impose certain terms of punishment in the case of conviction for *simple larceny* after previous conviction for certain offences. The punishment for simple larceny, after previous conviction for felony, is penal servitude from five to ten years, or imprisonment not exceeding two years, with or without hard labour, or solitary confinement; and in the case of a male under sixteen years of age, with or without whipping (*k*). For simple larceny, or any offence made punishable as simple larceny by the Larceny Act,

(*g*) 7 & 8 Geo. 4, c. 28, s. 8 (see also s. 9); 20 & 21 Vict. c. 3, s. 2; 27 & 28 Vict. c. 47, s. 2.

(*h*) As to hard labour, v. p. 460.

(*i*) 7 & 8 Geo. 4, c. 28, s. 11; 20 & 21 Vict. c. 3, s. 2; 27 & 28 Vict. c. 47, s. 2; 42 & 43 Vict. c. 55, s. 1. This statute has reduced the minimum term of penal servitude, after a previous conviction for felony, from seven to five years. See also *R. v. Horn*, 48 L. T. N. S. 272.

(*k*) 24 & 25 Vict. c. 96, s. 7.

after previous conviction for any indictable misdemeanor under the Larceny Act, the punishment is penal servitude from five to seven years, or imprisonment as in the last case (*l*). The same limits of punishment apply to simple larceny, or an offence punishable as simple larceny, after two summary convictions for offences punishable upon summary conviction under certain enumerated Acts (*m*).

For uttering, &c., counterfeit coin, after previous conviction for such crime, or previous conviction for a felony against a Coinage Act, the punishment is penal servitude for life, or for not less than five years, or imprisonment not exceeding two years, with or without hard labour, or solitary confinement (*n*).

Uttering, &c.,
counterfeit
coin after
previous con-
viction.

We may notice here that if the prisoner is found guilty of several distinct offences on different counts, he may be sentenced to several terms of punishment; such terms to be concurrent, or the second to commence at the expiration of the first (*o*). When a sentence for felony is passed on a person already suffering imprisonment for another crime, the court may order the imprisonment for the subsequent offence to commence at the expiration of the former term; so also the court may order a sentence of penal servitude to commence after the previous imprisonment or penal servitude, although the aggregate term of imprisonment or penal servitude respectively may exceed the term for which either of these punishments could be otherwise awarded (*p*).

Several terms
of punishment
concurrent or
continuous.

The punishments which the law prescribes are the following :—

Sanctions of
the law
enumerated.

Death ; Penal Servitude ; Imprisonment ; Fine.

(*l*) 24 & 25 Vict. c. 96, s. 8.

(*m*) Ibid. s. 9.

(*n*) Ibid. c. 99, s. 12.

(*o*) *R. v. Castro*, L. R. 5 Q. B. D. 490.

(*p*) 7 & 8 Geo. 4, c. 28, s. 10.

Incidental to the imprisonment are sometimes

Hard Labour; Whipping; Solitary Confinement.

In addition to other punishment there is often made an order that the person convicted be under police supervision for a certain time.

Again, in some cases the ends of justice are attained by requiring the prisoner to enter into recognizances to come up for judgment if called for; which generally means that if he conducts himself with propriety he will hear nothing more of the matter.

The prisoner may also be required to find sureties to keep the peace, or to be of good behaviour.

Youthful offenders, under certain circumstances, may be sent to reformatories or industrial schools.

Each of the above-named sanctions of the law will in turn receive a brief notice.

Death.

Death.—This is the only punishment which must be awarded in treason and murder. And it cannot be awarded in any other cases except piracy, or the two crimes of setting fire to Her Majesty's vessels of war or to ships, &c., in the port of London (*q*).

Penal servitude.

Penal Servitude.—This mode of punishment was introduced in substitution for transportation beyond the seas in certain cases by 16 & 17 Vict. c. 99, and totally superseded transportation by 20 & 21 Vict. c. 3. It was placed generally on the same footing as the latter punishment: thus, any person who might formerly have been sentenced to transportation is now liable to be kept in penal servitude for the same period; and

(*q*) As to recording sentence, v. p. 448. As to mode of execution, v. p. 477.

any person who might have been sentenced either to transportation or imprisonment may now be sentenced either to penal servitude or imprisonment. But in cases where before the Act sentence of seven years' transportation might have been passed, the court may now pass sentence of not less than five years' penal servitude (*r*).

Persons sentenced to penal servitude may be confined in any prison, or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation might formerly be confined, or in any other prison in the United Kingdom, or in Her Majesty's dominion beyond the sea, as one of Her Majesty's secretaries of state may direct. And in other respects, as to custody, hard labour, management, control, property in their services, and punishment for unlawfully being at large before the expiration of their term (*s*), they may be dealt with as persons sentenced to transportation formerly were (*t*).

Place of confinement in penal servitude.

The shortest term of penal servitude which can be awarded is five years (*u*).

Imprisonment.—As a general rule, no longer sentence of imprisonment than for two years can be awarded. From that to penal servitude (if allowed in the particular case) for five years there is a spring. But under some statutes still in force, imprisonment to the extent of three or four or even more years may be awarded, for example, under 24 & 25 Vict. c. 134, s. 221; 24 & 25 Vict. c. 98, s. 11; 7 Wm. 4 and 1 Vict. c. 36, s. 26; 2 Geo. 2, c. 25, s. 2; 7 & 8 Geo. 4, c. 28, s. 11.

Imprisonment.

(*r*) 20 & 21 Vict. c. 3, s. 2; 27 & 28 Vict. c. 47, s. 2.

(*s*) v. p. 79.

(*t*) 16 & 17 Vict. c. 99, s. 6; 20 & 21 Vict. c. 3, s. 3.

(*u*) 27 & 28 Vict. c. 47, s. 2; 42 & 43 Vict. c. 55, s. 1.

Fine.

Fine.—In offences punishable by fine usually the amount of the fine is not restricted by statute. The reason of this is obvious. Not only does the value of money change from time to time, but a fine which would be ruin to one man would be matter of indifference to another (*x*). The Bill of Rights provides that excessive fines shall not be imposed. It would be imprudent to hinder a man from getting his livelihood; and if the crime demands more severe punishment, the court may award imprisonment, for it is generally empowered to award either the one or the other, and frequently both. Felonies are very rarely punished by mere fine (*y*). Each of the Criminal Consolidation Acts, 1861, provides that a person convicted of a misdemeanor under those Acts may be fined in addition to or in lieu of other punishment (*z*).

Hard labour.

Hard Labour.—This punishment may be added in nearly all classes to imprisonment for *felony*. The *misdemeanors* to the imprisonment for which hard labour may be added are enumerated in 3 Geo. 4, c. 114, and 14 & 15 Vict. c. 100, s. 29. Each of the Criminal Consolidation Acts, 1861, contains a clause to the effect that the court may add hard labour to imprisonment in case of indictable offences, *felonies* or *misdemeanors*, under those Acts (*a*). Also in offences under the Post Office Acts for which imprisonment may be awarded, the court may add hard labour (*b*). So that in nearly every case now hard labour may accompany imprisonment.

Two classes of hard labour are distinguished—one for the employment of males above the age of sixteen;

(*x*) 4 Bl. 378.

(*y*) v. 24 & 25 Vict. c. 100, s. 5.

(*z*) 24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; c. 100, s. 71.

(*a*) 24 & 25 Vict. c. 96, s. 118; c. 97, s. 74; c. 98, s. 52; c. 99, s. 39; c. 100, s. 69.

(*b*) 7 Wm. 4 & 1 Vict. c. 36, s. 42.

the other for that of males below that age and of females. Regulations as to its nature and application are made by statute (*c*).

Whipping.—Two classes of cases in which whipping Whipping, is allowed must be distinguished:—(i.) of males below the age of sixteen; (ii.) of males of any age. It should be premised that a female can never be whipped. Where formerly sentence of whipping might be passed, the court or magistrate may now order the female to be kept to hard labour for a term not exceeding six months nor less than one month, in lieu of the whipping (*d*).

i. By three of the Consolidation Acts whipping may in case of juvenile offenders : be inflicted for a variety of specified offences committed by males under the age of sixteen, and in one case, males under the age of eighteen (*e*). It is to take place once, and the number of strokes and the instrument with which they are to be inflicted are to be specified by the court in the sentence (*f*).

When this punishment is awarded by the magistrates in the exercise of their summary jurisdiction, the sentence must specify the number of strokes and the instrument; and in the case of an offender whose age does not exceed fourteen, the number of strokes must not exceed twelve, and the instrument used must be a birch rod. And for a child under the age of ten the number of strokes must not exceed six. The offender must not be whipped more than once for the same offence (*g*).

ii. Whipping once, twice, or thrice, may be awarded in case of males of any age. to males of any age in case of:—

(*c*) 28 & 29 Vict. c. 126, s. 19, and Part IV. sched. i. regs. 34–37.

(*d*) 1 Geo. 4, c. 57, s. 2.

(*e*) 24 & 25 Vict. c. 96, s. 101. This exception is probably a mere oversight on the part of the legislature.

(*f*) 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 100, s. 70.

(*g*) 25 & 26 Vict. c. 18; 42 & 43 Vict. c. 49, ss. 10, 11.

(a.) Robbery, &c., with violence—or an attempt to choke, suffocate, or strangle. The following regulations must be observed:—The whipping must be privately inflicted; (β) if the age of the offender does not exceed sixteen, the number of strokes at each whipping must not exceed twenty-five, and the instrument must be a birch rod; (γ) in other cases not more than fifty strokes at a whipping; (δ) the court must specify the number of strokes and the instrument; (ε) the whipping must not take place after six months from the sentence; (ζ) in the case of a person sentenced to penal servitude, the whipping must be inflicted before he is removed to a convict prison (h).

(b.) Felony, after a previous conviction for felony; and certain offences relating to the falsifying of certificates of previous conviction. The whipping is to be publicly or privately inflicted (i).

(c.) Felony for which no particular punishment has been provided (k).

Solitary confinement.

Solitary Confinement.—This may be ordered in certain specified cases mentioned in the Criminal Consolidation Acts. Also for felonies for which no particular punishment has been prescribed by statute (l); and for certain other offences which it is unnecessary to enumerate. But in no case may a prisoner be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year (m).

Police supervision.

Police Supervision.—When any person is convicted on an indictment for a *crime* (explained by the Act to

(h) 26 & 27 Vict. c. 44.

(i) 7 & 8 Geo. 4, c. 28, s. 11.

(k) *Ibid.* s. 8.

(l) *Ibid.* s. 9.

(m) 7 Wm. 4 & 1 Vict. c. 90, s. 5; 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 98, s. 53; c. 99, s. 40; c. 100, s. 70.

mean in England—any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or of obtaining by false pretences, or of conspiracy to defraud, or of any misdemeanor under 24 & 25 Vict. c. 96, s. 58), and a previous conviction of a crime is proved against him, the court may, in addition to any other punishment, direct that he is to be subject to the supervision of the police for a period of seven years or less, commencing immediately after the expiration of the sentence passed on him for the last of such crimes (n).

The consequence of such sentence is that the person to be supervised must notify the place of his residence to the chief officer of police of the district in which his residence is situated, or to the constable or person in charge of the chief office or of the office or station to which he has received notice to report himself; and must also notify any change within such district; and if he goes out of the district, he must notify the change to such officer or constable in the district he is leaving, and also to such officer or constable in the district to which he is going. If a male, he must report himself personally or by letter, as required, once a month, to the chief officer of the district, or such other officer or constable as above mentioned. If he offends against these regulations, or is forty-eight hours in any place without notifying the place of his residence to the chief officer or such other officer or constable as above mentioned, he is subject to imprisonment with or without hard labour for a term not exceeding one year (o).

What it consists in.

Recognizances and Sureties.—Under each of the Criminal Consolidation Acts, in case of conviction for an indictable *misdemeanor* punishable under those Acts,

Entering into recognizances and finding sureties.

(n) 34 & 35 Vict. c. 112, s. 8.

(o) Ibid.; 42 & 43 Vict. c. 55, s. 2.

the court may fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour, in addition to or in lieu of any other punishment. In case of a *felony* punishable under the Acts, the court may order him to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any other punishment. But under these clauses no one may be imprisoned for not finding sureties for any period exceeding one year (*p*).

Reformatories. *Reformatory and Industrial Schools.*—When any offender who, in the judgment of the court or magistrates, is under the age of sixteen years, is convicted of an offence punishable by penal servitude or imprisonment, and is sentenced to imprisonment for ten days or more, the court or magistrates may also sentence him to be sent, after his imprisonment, to a certified *reformatory* school, to be there detained for a period of from two to five years. But if he is under the age of ten years he may not be sent to a reformatory unless he has been previously charged with some offence punishable by penal servitude or imprisonment; or is sentenced by a Judge of assize or a court of general or quarter sessions. The court sending such a youthful offender to a school will choose one of his apparent religious persuasion (*q*).

Industrial schools.

Industrial schools meet the case of those who have not to so great an extent fallen into crime, but are on the highway to it. Thus, two magistrates may send the following, among others, to such schools: children apparently under the age of *fourteen* begging, having no home or visible means of existence, in the company of reputed thieves; destitute orphans, or having a surviving parent in penal servitude or imprisonment;

(*p*) 24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; c. 100, s. 71.

(*q*) 29 & 30 Vict. c. 117, s. 14.

children apparently under the age of *twelve* charged with an offence punishable by imprisonment or less punishment, but not having been convicted of felony, &c. No child is detained in such school after he has attained the age of sixteen, unless with his own consent expressed in writing (*r*).

Other Consequences of Conviction.

Until recently certain forfeitures and other consequences followed on conviction for treason or felony. But by statute (*s*) it has been provided that from and after the passing of the Act (July 4, 1870) no confession, verdict, inquest, conviction, or judgment of or for any treason, felony, or *felo de se*, shall cause any *attainder*, or *corruption of blood*, or any *forfeiture*, or *escheat*; provided that nothing in the Act shall affect the law of forfeiture consequent upon outlawry. Of course this does not refer to, or interfere with, any fine or penalty imposed in the sentence (*t*).

But a conviction for treason or felony for which the sentence is death, penal servitude, or imprisonment with hard labour, or exceeding twelve months, determines the tenure of any military or naval office, or any civil office under the Crown, or other public employment, or any ecclesiastical benefice, or any office or emolument in any university or other corporation, or any pension or superannuation allowance payable by the public, or out of the public funds, unless a pardon is received within two months after the conviction, or before the filling up of the office, place, &c., if given at a later period. It also disqualifies for the future, until the punishment has been suffered or pardon received, the felon from holding any military or naval office, or any civil office under the Crown, or other public employment, or any

(*r*) 29 & 30 Vict. c. 118.

(*s*) 33 & 34 Vict. c. 23, s. 1.

(*t*) *Ibid.* s. 5.

ecclesiastical benefice, or of being elected, or sitting, or voting as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise within England, Wales, or Ireland (*u*).

Property of a
felon after
conviction.

As to the *property* of the felon.—By the same statute (*x*) it is provided that this may be committed to the custody and management of an administrator, to be appointed by the Crown; or, in default of such appointment, to the management of an *interim* curator, who may be appointed by the magistrates on an application made in the interest of the felon or his family. The administrator or curator must pay his debts and liabilities, and support his family, and preserve the residue of the property for the felon himself or his representatives, on the completion of his punishment, his pardon, or his death.

Costs and
compensation.

Persons convicted of treason or felony may be condemned in *costs*; and if convicted of felony may be ordered to pay a sum of money not exceeding £100, as compensation to the person defrauded or injured by the commission of the felony (*y*).

(*u*) 33 & 34 Vict. c. 23, s. 2.

(*x*) Ibid. ss. 9, 18, 21.

(*y*) Ibid. ss. 3, 4.

CHAPTER XXII.

PROCEEDINGS AFTER TRIAL.

THOUGH there is no appeal on the merits in a criminal case, the verdict of the jury does not always determine the conviction or acquittal of the prisoner. We have already seen (z) that judgment may be arrested on certain grounds. It remains to consider those cases in which the judgment, though actually given, is subsequently affected. This matter will be treated of under the heads of New Trial, Reversal of Judgment by Writ of Error, and the Court for Crown Cases Reserved. The subject of Reprieve and Pardon will form a separate chapter.

Verdict, when it does not take effect.

NEW TRIAL.

"Where an indictment has been preferred in the Queen's Bench, or has been removed into that court by *certiorari*, a new trial may, after *conviction*, be moved for, on the ground that the prosecutor has omitted to give due notice of trial; or that the verdict has been contrary to evidence, or to the direction of the judge; or for the improper reception or rejection of evidence, or other mistake or misdirection of the judge; or for any gross misbehaviour of the jury among themselves; or for surprise; or for any other cause where it shall appear to the court that a new trial will further the ends of justice" (a).

New trial, when allowed.

It is now settled that only in misdemeanors, and not

(z) v. p. 447.

(a) Arch. 194.

in felonies, can a new trial be granted (*b*). As a rule, after a verdict of acquittal, a new trial will not be granted; but this rule is subject to qualifications, for example, where the defendant has kept back witnesses for the prosecution; or where the object of the criminal proceeding is to try a right, as in the case of a prosecution for the non-repair of roads (*c*).

And it would seem that even in the last mentioned class of cases, if a defendant has been tried upon an indictment involving the danger to him of imprisonment if found guilty and has been acquitted, no new trial can be had (*d*).

New trial, by whom granted. Only in case of some irregularity in the proceedings, or, in other words, a mis-trial, can any other court than the Queen's Bench grant a new trial, the mis-trial being regarded as a mere nullity.

New trial, how obtained. The motion for a new trial is made upon the judge's notes of the trial, or upon affidavit, the defendant being present in court. When counsel have been heard on both sides, the court either makes the rule absolute or discharges it, with or without costs. If the new trial is granted, the effect of the former trial is completely swept away, and all the facts are re-heard.

REVERSAL OF JUDGMENT BY WRIT OF ERROR.

Reversal of judgment. As a rule, the only way in which judgment can be reversed is by writ of error, though such writ is not necessary if the objection is to some matter *dehors* or foreign to the record, as if judgment be given by persons who have no authority.

Writ of error. A writ of error is a writ directed to an inferior court

(*b*) *R. v. Bertrand*, L. R. 1 (Priv. Council) 520.

(*c*) *v. R. v. Chorley*, 12 Q. B. 515.

(*d*) *R. v. Duncan*, 7 Q. B. D. 198; 50 L. J. (M.C.) 94; 44 L. T. (N.S.) 521.

which has given judgment against the defendant, requiring it to send up the record and proceedings of the indictment in question to the Queen's Bench Division, for that court to examine whether the errors alleged took place, and to affirm or reverse the judgment of the inferior court. It must be grounded on some substantial defect apparent on the face of the record, as if the indictment be bad in substance, or the sentence be illegal. It will never be allowed for a formal defect (*e*). The following are examples of cases where it has been held that a writ of error would lie: in perjury, where the court has not competent authority to administer the oath; in libel, if the words do not appear to be libellous; in false pretences, if it is not shewn what the false pretences were (*f*).

Before suing out the writ of error, it is necessary to obtain the fiat of the Attorney-General, on shewing reasonable ground of error. This is at the discretion of the Attorney-General, but is not generally refused; indeed, in misdemeanors, it is granted as a matter of course. The writ is delivered to the clerk of the peace, or other officer of the court to which it is directed, who has the custody of the indictment. He makes up the record and makes out the return to the court. The party suing assigns his errors. The Crown joins in error. The case is argued, and judgment of affirmance or reversal given. The court of error may either pronounce the proper judgment itself, or remit the record back to the inferior court, in order that the latter may pronounce judgment (*g*).

Proceedings on writ of error.

If judgment is affirmed, the defendant may be at once committed to prison; and if he does not surrender

Judgment affirmed.

(*e*) v. 14 & 15 Vict. c. 100, s. 25.

(*f*) v. *Castro v. Murray*, 32 L. T. (N.S.) 675.

(*g*) 11 & 12 Vict. c. 78, s. 5.

within four days, a judge may issue a warrant for his apprehension (*h*).

Judgment reversed.

If judgment is reversed, all the former proceedings are null and void, and the defendant is in the same position as if he had never been charged with the offence, therefore he may be indicted again on the same ground.

Interval before judgment in error.

In the interval before the result of the proceedings in error is known, in cases of misdemeanor the defendant is discharged from custody on entering into the recognizances with sureties required by the Acts mentioned below; in felonies he remains in custody (*i*).

The Supreme Court of Judicature Acts and error.

The jurisdiction in error in criminal cases is thus regulated by the Supreme Court of Judicature Acts. On a judgment of the High Court of Justice (including the Queen's Bench Division, commissions of gaol delivery and oyer and terminer), an appeal lies to the Court of Appeal, if there is some error of *law* apparent on the face of the record, as to which no question has been reserved under 11 & 12 Vict. c. 78. But with that exception, and except when questions have been reserved under the statute, in no case does an appeal lie from the High Court or any of its Divisions in any criminal cause or matter (*j*). And as to appeals from quarter sessions and other inferior courts, which might have been brought to any court or judge whose jurisdiction is transferred to the High Court of Justice, it is provided that they may be heard and determined by divisional courts of the High Court consisting of

(*h*) 16 & 17 Vict. c. 32, s. 4.

(*i*) 8 & 9 Vict. c. 68, s. 1; 9 & 10 Vict. c. 24, s. 4; 16 & 17 Vict. c. 32, s. 1.

(*j*) 36 & 37 Vict. c. 66, ss. 18, 19, 47. As to 11 & 12 Vict. c. 78, v. p. 471. As to what is a criminal cause or matter, v. *Blake v. Beech*, L. R. 2 Ex. D. 335; *R. v. Steel*, L. R. 2 Q. B. D. 37; 46 L. J. (M. C.) 1; *R. v. Fletcher*, L. R. 2 Q. B. D. 43; 46 L. J. (M. C.) 4; *Mellor v. Denham*, L. R. 5 Q. B. D. 467.

judges who may be assigned for that purpose. The determination of such appeals respectively by these divisional courts is final, unless special leave to appeal to the Court of Appeal is given by the divisional court so hearing (*k*).

COURT FOR CROWN CASES RESERVED. .

If any question of law arises at a trial for treason, felony, or misdemeanor, which the court (whether a judge at the assizes, the justices or recorder at the quarter sessions) deems it inexpedient or impracticable to decide at once and of itself, it reserves the point for the consideration of the Court for Crown Cases Reserved; provided, of course, a conviction takes place, for otherwise there would be no need for further consideration (*l*). Such court consists of the judges of the High Court of Justice or five of them at least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas Division, or the Lord Chief Baron, must be one (*m*).

Crown cases reserved.

The court reserving the point may respite execution of the judgment on such conviction, or postpone the judgment until the question is decided. And in either case, to secure the appearance of the defendant when he is required, the court will, in its discretion, either commit him to prison or take a recognizance of bail with one or two sureties (*n*).

Interval before decision.

The Court for Crown Cases Reserved hears counsel on either side, even though counsel do not appear on the other side. If they appear on both sides, the counsel for the prisoner begins and has a reply. If counsel do not appear at all, the Lord Chief Justice or

Proceedings in the Court for Crown Cases Reserved.

(*k*) 36 & 37 Vict. c. 66, s. 45.

(*l*) 11 & 12 Vict. c. 78, s. 1.

(*m*) Ibid. s. 3; 36 & 37 Vict. c. 66, s. 47.

(*n*) Ibid. s. 1.

Lord Chief Baron presiding reads the case and then judgment is pronounced. The judgment is that the court reverses, affirms, or amends the judgment of the court reserving the point; or avoids such judgment and orders an entry to be made on the record that, in the opinion of the Court for Crown Cases Reserved, the party convicted ought not to have been convicted; or orders judgment to be given at some other assizes or sessions if no judgment has been given up to that time; or makes such other order as justice requires. The order of the court, whether for execution of judgment or discharge of the prisoner, is carried out by the sheriff or gaoler in whose custody the person convicted is; to whom a certificate of such order is transmitted by the clerk of the assize, or of the peace (*o*). The court may send the case back for amendment; and after that has been affected, judgment will be delivered (*p*).

No appeal.

The determination of any such question in the manner indicated above is final and without appeal (*q*).

(*o*) 11 & 12 Vict. c. 78, s. 2.

(*p*) Ibid. s. 4.

(*q*) 36 & 37 Vict. c. 66, s. 47.

CHAPTER XXIII.

REPRIEVE AND PARDON.

A REPRIEVE (*reprendre*) is the withdrawing of a sentence Reprieve : for an interval of time ; whereby the execution of a criminal is suspended (*r*).

Reprieves may be granted either :—

i. By the *Crown* (*ex mandato regis*) at its discretion ; by Crown ; its pleasure being signified to the court by which execution is to be awarded.

ii. By the *court* empowered to award execution, either by court. before or after verdict (*ex arbitrio judicis*). Generally it must be guided by its own discretion, as to whether substantial justice requires it, as for example, when it is not satisfied with the verdict. But in two cases the court is bound to grant a reprieve. When a woman sentenced to death is ascertained to be pregnant. To discover whether she is *quick* with child a jury of twelve matrons is empanelled. If so found, she is reprieved until either she is delivered or proved by the course of nature not to have been with child at all. But after she has been once delivered, she cannot be reprieved on this ground a second time. (b.) When the prisoner becomes insane after judgment. We have already seen that the occurrence of insanity in the prisoner is a stay to proceedings at any stage.

Pardon.—The exercise of the prerogative of pardon- Pardon.

ing is at the absolute discretion of the sovereign. If, either from the opinion of judges represented to him, or for any other reason, the Home Secretary thinks the case a fit one for the interposition of royal mercy, he recommends the same to the Queen, and she usually acts on the recommendation.

Pardon, when it cannot be granted.

The sovereign cannot pardon where private interests are principally concerned in the prosecution of offenders "*non potest rex gratiam facere cum injuriâ et damno aliorum*"—for example, a common nuisance cannot be pardoned while it remains unredressed. But a recent statute (*s*) enables the sovereign to remit penalties, although they may be wholly or in part payable to some other than the Crown (*t*). There is another case in which the offender cannot be pardoned, namely, when he is guilty of the offence of committing a man to prison out of the realm (*u*). It should also be noticed that a pardon cannot be pleaded to an impeachment so as to stifle the inquiry. But of course the person impeached and sentenced may be afterwards pardoned (*x*).

How made out and how construed.

A pardon must be by warrant under the great seal, or under the sign manual. As a rule, it is to be taken most beneficially *for* the subject and *against* the Queen (*y*).

Conditional pardon.

A pardon may be *conditional*—the most frequent example of which is when a person sentenced to death is pardoned on the condition that he submit to punishment either of penal servitude or imprisonment (*z*).

(*s*) 22 Vict. c. 32.

(*t*) See also 24 & 25 Vict. c. 96, s. 109; c. 97, s. 67.

(*u*) 31 Car. 2, c. 2.

(*x*) 12 & 13 Wm. 3, c. 2, s. 12.

(*y*) See further 4 St. Bl. bk. vi. c. 25.

(*z*) v. 5 Geo. 4, c. 84; 20 & 21 Vict. c. 3.

Ticket of Leave.

In connection with the subject of pardon, it will be convenient to notice the case of those who are allowed to be at large before the expiration of their term of confinement. Ticket of leave.

When any person is sentenced to penal servitude or imprisonment, the Queen, by order in writing under the hand and seal of the Secretary of State, may grant him a *licence to be at large* in the United Kingdom and the Channel Islands, or in such part thereof respectively as in such licence shall be expressed, during such portion of the term of penal servitude or imprisonment, and upon such conditions as Her Majesty thinks fit. But the licence may be revoked or altered at the Queen's pleasure. It will be forfeited in the event of (a) a subsequent conviction, (b) of failure to report himself to the police unless prevented by unavoidable cause, (c) of changing residence without due notification. On the subsequent conviction the offender will first suffer the punishment attached to such offence, and then finish his original term. If the licence is revoked, the convict may be apprehended and sent back to the prison from which he came to undergo the residue of his sentence; or he may be sent to any other prison wherein convicts under sentence of penal servitude may lawfully be confined. Forfeiture, &c.

Certain offences connected with these licences subject the holders to imprisonment for a term not exceeding three months, on summary conviction. The holder of a licence suspected of committing an offence may be apprehended without a warrant (a). Offences by holders.

In the case of those sentenced to penal servitude, the Remission, how regulated.

(a) 16 & 17 Vict. c. 99, ss. 9-11; 20 & 21 Vict. c. 3, s. 5; 27 & 28 Vict. c. 47, ss. 4-10; 34 & 35 Vict. c. 112, ss. 3-5.

remission of a part of the term, proportioned to the number of years contained in the sentence, follows as a matter of course if the convict conducts himself well. But if the sentence is penal servitude for life, the special order of one of the secretaries of state is required.

CHAPTER XXIV.

EXECUTION.

EXECUTION is carried out by the sheriff or his deputy, Execution. thus giving effect to the sentence of the judge. It is the usage for the judge, at the end of the assizes, to sign the calendar containing the prisoners' names and sentences. This is left to the sheriff as his warrant and authority; and if he receive no special order to the contrary, he executes the judgment therein contained.

The criminal is usually executed about a fortnight Time and or three weeks after his sentence. An execution for place. murder must take place within the walls of the prison in which the offender is confined at the time (b).

If the execution be not by the proper officer, or if Manner. not carried out in strict conformity with the sentence, as if the criminal is beheaded instead of hanged, the official is guilty of murder. If the criminal survives, he must be hanged again, inasmuch as the sentence is that he be hanged by the neck till he is dead.

(b) 31 Vict. c. 24, s. 2.

BOOK IV.

SUMMARY CONVICTIONS.

Summary convictions. A CERTAIN class of convictions are described as "summary" to distinguish them from such as follow after a regular trial on an indictment or information. The essence of summary proceedings is the absence of the intervention of a jury; the person accused being acquitted or condemned by the decision of the person who is instituted judge. Blackstone viewed with apprehension the extension of this mode of proceeding, which threatened the disuse of trial by jury. The tendency still exists "to multiply classes of crimes which entail the lowest order of punishment, and require for investigation the lowest rank of judicial tribunals" (a).

The only class of summary proceedings which is to be dealt with in this chapter is by far the most extensive and important—*Summary convictions before magistrates out of Quarter Sessions* (b).

Jurisdiction of magistrates, how acquired. The original functions of justices of the peace, when not in general or quarter sessions, were chiefly to prevent breaches of the peace and to cause offenders to be apprehended. But their jurisdiction has been gradually extended. A great number of minor offences can be dealt with satisfactorily without the expense and delay of bringing them before the ordinary courts.

(a) Amos' Jurisprudence, 303.

(b) We have already noticed a form of summary proceeding in the event of contempt of court (v. p. 105). Another class comprises the proceedings before commissioners of Inland Revenue; but there is no need to enter into the details of this subject. v. 7 & 8 Geo. 4, c. 53; 15 & 16 Vict. c. 61.

Accordingly, from time to time authority has been conferred by statute on the magistrates to examine into such offences and punish the offenders. It is only in virtue of legislative enactments that they act in this capacity. In some cases the offenders are punished ^{Punishments.} merely by the infliction of a pecuniary penalty. In other cases the magistrates are empowered to punish by a penalty or imprisonment with hard labour not exceeding six months; or, if there has been a previous conviction, twelve months. And in any case where a person has been, on summary conviction, ordered to pay a penalty, on his failure to do so he may be committed to prison for a period depending on the amount of the penalty: but in no case exceeding three months (c).

Instead of inflicting the punishments attached to the particular offences, a court of summary jurisdiction has now a general power where it thinks that, though the charge is proved, the offence is in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment, either :— ^{Power of mitigating punishment.}

(a.) Without proceeding to conviction to dismiss the information; and, if the court thinks fit, to order the person charged to pay such damages, not exceeding forty shillings, and such costs of the proceeding, or either of them, as the court thinks reasonable; or (b.) upon conviction of the person charged, to discharge him conditionally on his giving security, with or without sureties, to appear for sentence when called upon, or to be of good behaviour, and either without payment of damages and costs, or subject to the payment of such damages and costs, or either of them, as the court thinks reasonable.

This general power does not, however, apply to the

case of an adult pleading guilty to a charge of an offence over which the court of summary jurisdiction would not have had jurisdiction but for the plea of guilty (*d*).

Effect of the court's judgment.

When the court deals with a case summarily and dismisses the information or convicts, the effect of such dismissal or conviction is the same as if the person charged had been acquitted or convicted respectively on indictment (*e*). And the conviction or certificate of dismissal is a bar to further proceedings for the same case (*f*).

Local limitation of jurisdiction.

Of course the jurisdiction of a magistrate is local, and not personal; that is, he can exercise it only in his own county, borough, or other district. And as a general rule, the jurisdiction is further limited to offences committed within such county, borough, or district. But, by some statutes, the magistrates have jurisdiction if the offender resides or is apprehended in, or the goods are found in, the county, &c. (*g*).

How many justices required.

In some cases one justice may act by himself, in others the statute requires the presence of more. But metropolitan police magistrates, city of London magistrates, and stipendiary magistrates have, within their jurisdiction, power in most cases to do alone whatever is authorized to be done by one or more justices (*h*).

No jurisdiction where property or title in question.

The magistrates have no jurisdiction to hear and determine cases in a summary manner where property or title is in question, though, if it had not been

(*d*) Summary Jurisdiction Act, 42 & 43 Vict. c. 49, s. 16.

(*e*) Ibid. s. 27.

(*f*) v. p. 379.

(*g*) For example, 11 Geo. 2, c. 19; 17 & 18 Vict. c. 104, s. 520. As to offences committed near the boundaries of the jurisdiction of a court, v. 42 & 43 Vict. c. 49, s. 46. See also 44 & 45 Vict. c. 24.

(*h*) Paley, Sum. Conv. 36.

for such question, they would have had cognizance thereof.

When a person is charged with any offence (except assault) for which he is liable on summary conviction to imprisonment for more than three months, he may, before the charge is gone into, claim to be tried by a jury; and thereupon the case will be treated as an indictable offence. Before the charge is gone into, he should be informed of his right of trial by jury, and asked if he desires such a trial. And in the case of a child similar information must be given to the child's parent or guardian, if present; and such parent or guardian has the right of claiming trial by jury (i). Right of trial by jury.

We shall first notice some of the chief offences which have been made the subjects of summary proceedings, and then inquire into the nature of such proceedings.

As in some cases the limit of jurisdiction and the extent of punishment which can be inflicted by courts of summary jurisdiction differ according to the age of the persons accused, and in some cases jurisdiction exists only when the accused is under a certain age, it will be convenient to classify offences in accordance with these distinctions, and to treat of them in the following order:— Offences dealt with summarily classified.

1. Offences by children.
2. Offences by young persons as distinguished from adults.
3. Offences by adults as distinguished from young persons.
4. Common assaults.

(i) Summary Jurisdiction Act, 42 & 43 Vict. c. 49, s. 17.

5. Larcenies not indictable.
6. Small wilful injuries to property.
7. Offences relating to game.

It should be observed that the first three of these classes of offences comprise indictable offences which can be dealt with summarily on admission of guilt, or by consent of the accused, or in the case of children, by consent of their parents or guardians. The remainder chiefly consist of offences which are punishable on summary conviction without the option of trial by jury.

Definition of
children and
young persons.

For the purposes of the Summary Jurisdiction Act, 1879, a *child* is defined to be a person who in the opinion of the court before whom he is brought is under the age of twelve years. A *young person* is one who in the opinion of the court is over twelve and under sixteen years of age. And an *adult* is one who in the opinion of the court is over sixteen years of age.

I. *Offences by Children.*

Offences by
children.

When a child is charged with any indictable offence other than homicide before a court of summary jurisdiction, such court may, if they think it expedient, and if the parent or guardian of the child on being informed of the right of trial by jury does not object, deal summarily with the offence, and inflict the same description of punishment as might have been inflicted had the case been tried on indictment; except

that no sentence of penal servitude shall be given,
but imprisonment instead;

that imprisonment shall not exceed one month;
fine shall not exceed forty shillings;

that whipping may be inflicted on a male child either in addition to or in substitution for any other punishment (*k*).

In no case may a child be imprisoned for more than one month, or fined more than forty shillings (*l*).

2. *Offences by Young Persons.*

When a young person is charged with any of the following indictable offences:— Offences by
young persons.

- (a.) Simple larceny ;
- (b.) Offences declared by statute to be punishable as simple larceny ;
- (c.) Stealing from the person ;
- (d.) Larceny as a clerk or servant ;
- (e.) Embezzlement by a clerk or servant ;
- (f.) Receiving stolen goods (*i.e.*, offences specified in 24 & 25 Vict. c. 96, ss. 91, 95) ;
- (g.) Aiding, abetting, counselling or procuring the commission of any of the above offences ;
- (h.) Attempting to commit any of the above offences ;
- (i.) Offences with intent to endanger the safety of persons upon railways, &c., under 24 & 25 Vict. c. 100, ss. 32, 33 ;
- (k.) Offences with intent to injure railway engines, carriages, &c., under 24 & 25 Vict. c. 97, s. 35 ;
- (l.) Offences under the Post-Office laws ;

Such young person may, if he or she consent, and the court think it expedient, be dealt with summarily, and

(*k*) 42 & 43 Vict. c. 49, s. 10.

(*l*) *Ibid.* s. 15.

if found guilty may be adjudged either to pay a fine not exceeding ten pounds, or to be imprisoned, with or without hard labour, for any term not exceeding three months; and, if a male under the age of fourteen, to be whipped either in substitution for, or in addition to any other punishment (*m*).

3. *Offences by Adults* (as distinguished from young persons).

Offences by
adults,
Larcenies, &c.

i. *Small Larcenies and Embezzlements*.—When an adult is charged with any of the following indictable offences:—Simple larceny, offences punishable by statute as simple larceny, stealing from the person, larceny as a clerk or servant, receiving stolen goods, or aiding or abetting the commission of any of those offences, where the value of the whole of the property which is the subject of the alleged offence does not exceed forty shillings; or of an attempt to commit any of such offences, irrespective of the value of the property—he may, if he consent, and the court think it expedient, be dealt with summarily. And on conviction he is liable to imprisonment, with or without hard labour, for any term not exceeding three months, or to a fine not exceeding twenty pounds (*n*).

Larcenies to a
greater value.

ii. *Larceny and Embezzlement of property above the value of forty shillings*.—When an adult is charged with any of the offences named in the last paragraph, and the value of the property which is the subject of the alleged offence exceeds forty shillings, as soon as the court becomes satisfied that there is sufficient evidence to put the person charged on his trial, they may, if they deem it expedient to deal with the case summarily, call on the person to plead after having first had the charge reduced into writing, and having

(*m*) 42 & 43 Vict. c. 49, s. 11.

(*n*) *Ibid.* s. 12.

explained the effect of pleading. If he plead guilty, they shall cause a plea of guilty to be entered, and adjudge the prisoner to be imprisoned, with or without hard labour, for any term not exceeding six months (o).

In no case, however, can an adult be dealt with summarily when, owing to a previous conviction or indictment, the offence is punishable with penal servitude (p).

Common Assaults and Batteries.

When any person unlawfully assaults or beats another, two magistrates, upon complaint of the party aggrieved, may hear and determine such offence, and may inflict a fine to the extent of £5 (and in default of payment, one month imprisonment), or may sentence to imprisonment not exceeding two months. If the person assaulted, &c., is a male child under the age of fourteen, or a female of any age, the offender may be fined to the extent of £20, or imprisoned for a term not exceeding six months. He may also be bound over to keep the peace for a further period of six months (q).

When a husband has been convicted, summarily or otherwise, of an aggravated assault upon his wife, the court or magistrate, if satisfied that the future safety of the wife is in peril, has power to make an order having the effect of a judicial separation: and may also order the husband to pay a weekly sum for the wife's support, and to give the custody of children under ten years of age to the wife (r).

If the magistrates, upon the hearing of any of the

(o) 42 & 43 Vict. c. 49, s. 13.

(p) Ibid. s. 14.

(q) 24 & 25 Vict. c. 100, ss. 42, 43.

(r) 41 Vict. c. 19; v. p. 189.

Dismissal of
the case.

above cases of assault or battery, deem the offence not proved, or find the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismiss the complaint, they make out and deliver to the party charged a certificate stating the fact of such dismissal (s). This certificate, or the conviction (if the punishment has been suffered), is a bar to any other proceedings, civil or criminal, for the same cause (t).

Committal for trial.

But if the magistrates find that the assault or battery was accompanied by an attempt to commit a felony, or think, from any other circumstance, that it is a fit subject for prosecution by indictment, they abstain from adjudication, and send the case for trial. They may not determine any case of assault or battery in which a question arises as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of a court of justice (u).

5. *Larcenies not indictable.*

Non-indictable larcenies.

We have already, under the headings of Offences by Children, Offences by Young Persons, and Offences by Adults, dealt with the case of larcenies which are the subject of indictment, but which, in the different circumstances above mentioned, can be dealt with summarily. It now remains to treat of such unlawful takings of property as are punishable on summary conviction, but which do not amount to larceny in the strict sense of the term, inasmuch as they cannot be made the subject of indictment.

The taking of personal property, trees, animals, &c.—

(s) 24 & 25 Vict. c. 100, s. 44.

(t) Ibid. s. 45.

(u) Ibid. s. 46.

Almost every possible injury in the nature of an illegal taking of personal property or of things annexed to the realty, when not indictable, is punishable before one or more justices under the Larceny Consolidation Act, 1861 (x).

In some cases after one summary conviction, in some cases after two summary convictions for the offence, such offence amounts to a felony, and is indictable as larceny (y). The punishment for receiving stolen property when the original offence is punishable on summary conviction is the same as for the original offence (z). Subsequent offences.

6. *Small wilful Injuries to Property.*

Every possible injury to property, when not indictable, is punishable on summary conviction under the Malicious Injuries to Property Act, 1861 (a). Thus, it is provided that any person committing damage to any property, in any case not previously provided for, may, on conviction before a justice of the peace, be imprisoned for a term not exceeding two months, or fined to the extent of £5, and also ordered to make compensation not exceeding £5. In default of payment of these sums the offender may be imprisoned for a term not exceeding one month (b). Particular sections also deal with certain cases of injury, which are thus excluded from the operation of the general clause (c). In some cases a second or third offence amounts to a felony or misdemeanor (d). Wilful injuries.

(x) 24 & 25 Vict. c. 96 ; dogs, ss. 18, 19 ; deer, ss. 12, 14, 15 ; rabbits, s. 17 ; beasts or birds ordinarily kept in confinement, but not subjects of larceny, pigeons, fish, &c., ss. 21-24 ; trees, fences, vegetable productions, &c., ss. 33-37.

(y) See 24 & 25 Vict. c. 96, ss. 9, 12, 18, 19, 20, 21, 33, 34, 36, 37.

(z) Ibid. s. 97.

(a) 24 & 25 Vict. c. 97.

(b) Ibid. s. 52. If the injury exceeds in amount £5 the offence is, by s. 51, a misdemeanor.

(c) Trees, vegetable productions, &c., ss. 22-24 ; fences, walls, gates, s. 25 ; telegraphs, ss. 37, 38 ; animals not cattle, s. 41.

(d) 24 & 25 Vict. c. 97, ss. 22, 23.

7. *Offences relating to Game.*

Game offences. Among a great number of offences relating to game punishable on summary conviction, the following may be noticed :—

To obtain game by unlawfully going on any land in search for game, or to use guns, &c., for taking game, or to act as an accessory, is punishable by penalty to the extent of £5 ; the game and instruments being forfeited (*e*).

By night unlawfully to take or destroy game or rabbits, or enter with gun, &c., for the purpose of taking or destroying game, is punishable for the first offence by imprisonment to the extent of three months, for the second to the extent of six months (*f*).

PROCEEDINGS UPON SUMMARY CONVICTIONS.

Summary proceedings. The law upon this subject was consolidated in one of Jervis's Acts (*g*). It should be premised that the Act does not extend to convictions under the Factory Acts, nor to a few other matters specially mentioned (*h*).

The information. The following is an outline of the proceedings :—
An *information* is laid before a justice of the peace that a person has committed, or is suspected to have committed, an offence for which he is liable on summary conviction to be imprisoned, fined, or otherwise punished. This information gives the justice jurisdiction, and limits his inquiry to the matter contained therein. It must be laid (unless a particular

(*e*) 25 & 26 Vict. c. 114, s. 2.

(*f*) 9 Geo. 4, c. 69, s. 1. See also chapter on game, p. 148 ; 1 & 2 Wm. 4 c. 32 ; 7 & 8 Vict. c. 29.

(*g*) 11 & 12 Vict. c. 43. The other two are chapters 42 and 44 of the same year ; the former dealing with the performance of the duties of justices out of sessions with respect to persons charged with indictable offences (v. p. 327) ; the latter is an Act to protect justices from vexatious actions for acts done by them in the execution of their office.

(*h*) 11 & 12 Vict. c. 43, s. 35 ; 42 & 43 Vict. c. 49, sched. 2.

period is fixed by the statute on which it is founded) within six months from the time when the matter arose (i). It must be laid before a magistrate by the informant in person, or by his counsel or attorney, or other person authorized in that behalf (k). It need not be in writing, unless it is so directed to be by the statute, though of course it usually is in writing, and 11 & 12 Vict. c. 43 seems to assume this (l). Nor, as a rule, need it be on oath, unless a warrant to apprehend the person charged is issued in the first instance instead of a summons, in which case the matter of the information must be substantiated by the oath or affirmation of the informant, or of some witness on his behalf before the warrant is issued (m).

The next step is the issue of the *summons*, directed The summons. to the accused, and stating shortly the matter of the information, and requiring him to appear at a certain time and place to answer the information, and to be dealt with according to law. The summons is served by the proper officer on the party charged personally, or at his last or usual abode (n).

If the person so served with a summons does not Issue of a warrant. appear at the time and place specified, provided a reasonable time has intervened between the summons and the day appointed, the justice or justices may, upon the matter of the information being to their satisfaction substantiated by oath or affirmation, issue a *warrant* to apprehend the accused. Authority is given to them to issue a warrant in the first instance instead of issuing a summons, if they think fit, on the information being to their satisfaction substantiated by oath or affirmation (o). This warrant must state shortly the matter

(i) 11 & 12 Vict. c. 43, s. 11.

(k) Ibid. s. 10. v. Paley, Sum. Con. 73.

(l) Paley, Sum. Con. 78. Oke's Mag. Syn. 122.

(m) 11 & 12 Vict. c. 43, s. 10; see also s. 2. For forms, v. Oke's Mag. Formulist, pp. 7-10; see also Oke's Mag. Syn. pp. 123, *et seq.*

(n) 11 & 12 Vict. c. 43, s. 1.

(o) Ibid. s. 2.

of the information, must be under the hand and seal of the justices issuing it, and be directed to the constable in whose hands it remains in force until executed. It may be executed by apprehending the accused at any place within the jurisdiction of the issuing justice, or out of such jurisdiction on being indorsed or backed by a magistrate of the jurisdiction in which the defendant is (*p*).

Hearing in the absence of the accused. A second course may be pursued if the summons having been duly served is not obeyed. The justices may proceed *ex parte* to the hearing of the information, and may adjudicate thereon, as fully and effectually as if the party had personally appeared in obedience to the summons. But this does not dispense with the necessity for the due examination of the facts upon oath (*q*).

Attendance of witnesses, how secured. To secure the attendance of witnesses for the prosecution and for the accused they may be served with a summons, and, if this is disobeyed, with a warrant. Or, if the justice is satisfied on oath or affirmation that the witness will not attend to give evidence unless compelled, a warrant to secure such attendance may be issued in the first instance (*r*).

The hearing. The *hearing* takes place before one or more justices, the number being determined by the particular Act making the offence subject to the summary proceedings, or, if there is no direction on this point, before one justice of the jurisdiction where the matter has arisen.

The case. No case arising under any statute can be heard, tried, determined, or adjudged by a court of summary

(*p*) 11 & 12 Vict. c. 43, s. 3.

(*q*) Ibid. s. 2.

(*r*) Ibid. s. 7.

jurisdiction except when sitting in open court. "Open court" means either a petty sessional court-house, that is, a place where special or petty sessions are usually held, or an occasional court-house, that is, a police station or other place appointed by the petty sessions as a place to be used for an occasional court-house.

Two or more justices sitting in a petty sessional court-house, or the Lord Mayor, or any of the Aldermen of the City of London, or any police or stipendiary magistrate, sitting in a court-house, where he has the usual power of two justices, constitute "a petty sessional court." Petty sessional court.

No fine of more than twenty shillings and no imprisonment of more than fourteen days can be given by a court of summary jurisdiction other than a petty sessional court. Indictable offences can be dealt with summarily under the Summary Jurisdiction Act, 1879, only by a petty sessional court sitting on a day publicly appointed for hearing indictable offences. Other cases, under the Summary Jurisdiction Act or any future Act, triable by a court of summary jurisdiction, shall, unless otherwise provided, be tried only by a court of two or more justices or a petty sessional court. A case may be adjourned by a court of summary jurisdiction to the next practicable sitting of a petty sessional court (s).

The accused may make full defence and call witnesses, The hearing. and either party may be represented by counsel or attorney (t).

If the defendant fails to appear, the justice may proceed to hear and determine, or may adjourn. Failure of one party to appear. If the defendant appears, and the prosecutor does not,

(s) 42 & 43 Vict. c. 49, s. 20.

(t) 11 & 12 Vict. c. 43, s. 12.

the magistrate may dismiss the complaint or adjourn the hearing, and commit or discharge the defendant on his entering into due recognizances (*u*). The magistrate has power to adjourn the hearing, and commit the defendant for the interval, or suffer him to go at large, or discharge him on his entering into recognizances with or without sureties. If he fails to reappear the magistrate may transmit the recognizances to the clerk of the peace to be proceeded upon in like manner as other recognizances (*x*).

Proceedings at the hearing.

But if both the parties appear, the following are the proceedings. The substance of the information is read to the defendant, and he is asked if he has any cause to shew why he should not be convicted. If he admits the truth of the information, and does not shew any cause why he should not be convicted, the justice proceeds to convict and pass judgment. If he does not admit the truth of the charge the magistrate proceeds to hear the prosecutor, and such witnesses as he may examine (every examination being on oath or affirmation (*y*)), and such other evidence as he may adduce; then to hear the defendant, and his witnesses, and other evidence; after that to hear witnesses the prosecutor may examine in reply, if the defendant has examined any witnesses or given any evidence other than to his general character. But the prosecutor is not entitled to make any observations upon the evidence given by the defendant, nor the defendant to make any observations upon the evidence given by the prosecutor in reply. The magistrate then considers the whole matter, and determines the same by convicting the defendant or dismissing the information. If there are more magistrates than one the result is determined by the opinion of the majority; if they are

The decision.

(*u*) 11 & 12 Vict. c. 43, s. 13.

(*x*) Ibid. s. 16.

(*y*) Ibid. s. 15.

equally divided there may be a fresh information or adjournment to next sitting. If he (or they) convict, he makes a memorandum thereof, and the conviction being drawn up in proper form is lodged with the clerk of the peace to be filed among the records of the general quarter sessions. If the information is dismissed, the magistrate must give a certificate of the order of dismissal to the defendant, and this will be a bar to a subsequent information or complaint for the same matter against the same person (z).

The *judgment* consists of two parts, namely, the ad- The judgment.
judication of conviction, and the sentence or award of punishment. This punishment may be either fine or imprisonment, or both, according to the direction of the statute under which the offence falls, which statute also defines the limits of the punishment. Sometimes satisfaction to the wrongdoer may be ordered without the infliction of any other punishment (a). Again, sometimes the information may be dismissed without the infliction of any punishment, if it is inexpedient to inflict punishment (b), or the offence is too trifling (c).

The mode of enforcing payment of pecuniary fines is Payment of
fines.
by distress and sale of the goods and chattels of the person convicted. For this purpose the justice issues a warrant of distress, which is executed by the constable. But if it appears to the court of summary Distress or
imprisonment.
jurisdiction to whom application is made to issue a distress warrant, that the defendant has no goods whereon to levy the distress, or that in the event of a warrant being issued his goods will be insufficient to satisfy the money payable by him, or that the levy of the distress will be more injurious to him or his family than imprisonment, the defendant may be committed to prison

(z) 11 & 12 Vict. c. 43, s. 14.

(a) v. 24 & 25 Vict. c. 96, s. 108; c. 97, s. 66.

(b) 18 & 19 Vict. c. 126, s. 1; 26 & 27 Vict. c. 103, s. 1.

(c) 24 & 25 Vict. c. 100, s. 44.

at once for any period not exceeding the period for which he is liable to be imprisoned in default of payment (*d*). And in default of sufficiency of distress, unless the statute on which the conviction is founded provides some other remedy, he may be committed. But when by part payment or by the proceeds of a distress, the sum payable has been reduced so that the balance, if it had been the original sum payable, would have rendered the defendant liable in default only to a smaller period of imprisonment than the term to which he is liable under the conviction, the court shall on application reduce the term of imprisonment accordingly (*e*).

Wearing apparel and bedding of a person and his family cannot be taken under a distress. And the court has power to postpone the issue of a distress warrant for such time and on such conditions as it shall deem expedient (*f*).

A distress warrant shall not be executed after payment or tender to the constable charged with its execution of the sum mentioned therein, together with the charges of the distress up to the time of such payment or tender, or after the production to the constable of the receipt of the clerk of the court for the amount (*g*).

When the statute under which a penalty is adjudged provides for imprisonment in default of payment, but makes no provision for raising the amount by distress, then the amount cannot be raised by distress, but the defendant in default is committed to prison (*h*).

(*d*) 11 & 12 Vict. c. 43, s. 19; 42 & 43 Vict. c. 49, s. 21.

(*e*) Ibid. ss. 21, 22; 42 & 43 Vict. c. 49, s. 21, sub-s. 4.

(*f*) 42 & 43 Vict. c. 49, s. 21, sub-ss. 1, 2.

(*g*) Ibid. s. 43.

(*h*) 11 & 12 Vict. c. 43, s. 23.

As to *costs*.—On conviction, the magistrate may order the defendant to pay the prosecutor's costs. On dismissal, the magistrate may order the prosecutor to pay to the defendant such costs as seem reasonable. The amount is to be specified in the conviction or order of dismissal, and recovered as penalties are (i).

When a fine is imposed not exceeding five shillings, no costs shall be payable by the defendant to the informant without an express order; and the fine, or part thereof, may be ordered to be paid to the informant towards his costs; and all fees payable or paid by the informant shall be remitted or returned unless otherwise expressly ordered (k).

The Summary Jurisdiction Act, 1879, also provides for the payment of costs of indictable offences which are dealt with summarily by the county treasurer, in the same way as the costs of trials at the sessions or assizes (l).

As to *appeal* from the decision of the magistrate.—*Appeal*. Two kinds of appeal must be distinguished: (i.) the ordinary appeal to the quarter sessions; (ii.) the appeal to a superior court on a case stated by the justices out of sessions.

i. The ordinary appeal from a conviction by the magistrate is to the quarter sessions. But it is not a matter of common right; it must be given by express enactment, and is confined to cases referred to in such enactment. Two of the Criminal Consolidation Acts (the Larceny and Malicious Injuries Acts) confer a right to appeal when, on summary conviction, the sum adjudged to be paid exceeds £5, or the imprison- Appeal to
quarter ses-
sions.

(i) 11 & 12 Vict. c. 43, ss. 18, 26; see also s. 24.

(k) 42 & 43 Vict. c. 49, s. 8.

(l) *Ibid.* s. 28.

ment adjudged exceeds one month, or where the conviction has taken place before one justice only (*m*).

Appeal under
Summary
Jurisdiction
Act, 1879.

And by the Summary Jurisdiction Act, 1879, the right of appeal is extended to all cases where a person is adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence, or for failing to do or to abstain from doing any act or thing required to be done or left undone: except in the following cases:—Where the person has pleaded guilty, or admitted the truth of the information or complaint; where the imprisonment is adjudged for failing to comply with an order for payment of money, for the finding of sureties, for the entering into any recognizance, or for the giving of any security (*n*).

In some cases execution is not stayed by the appeal; but it generally is. The statutes generally require that notice of appeal should be given to the magistrate or prosecutor, or both, and that recognizances should be entered into to prosecute and pay costs. The usual time of appeal is the next quarter sessions of the county or borough, and if no limits are specified, the appeal must take place within a reasonable time.

Conditions of
appeal.

Under the Summary Jurisdiction Act, 1879, and any other Act giving the right of appeal, where no other terms and conditions are prescribed, appeals are subject to the following conditions and regulations:—

a. The appeal shall be to the next practicable court of general or quarter sessions having jurisdiction in the county, borough, or place for which the court of summary jurisdiction acted; and holden not less than

(*m*) 24 & 25 Vict. c. 96, s. 110; c. 97, s. 68. A reference to the tables in Oke's Magisterial Synopsis will shew in what cases there is appeal. There is no appeal, among other cases, in common assaults, larcenies under 18 & 19 Vict. c. 126, or the Juvenile Offenders' Act, drunkenness, &c.

(*n*) 42 & 43 Vict. c. 49, s. 19.

fifteen days after the day on which the decision was given upon which the conviction or order was founded.

b. The appellant must give notice in writing of his intention to appeal within seven days after the decision to the other party and to the clerk of the court of summary jurisdiction.

c. The appellant must, within three days after his notice of appeal, enter into recognizances or give security as the court may direct to prosecute the appeal, and abide the result and pay such costs as may be awarded.

d. If the appellant is in custody, he may be released if the court think fit, on entering into recognizances or giving security.

e. Notices to be given in writing by the appellant must be signed by him or his agent on his behalf, and may be sent by registered letter, and they will be deemed to have been served at the time when they would have been delivered in the ordinary course of post (*o*).

Large discretionary powers are given to the court of appeal in relation to costs, adjournments, and modifying, confirming or reversing the decisions of the court of summary jurisdiction.

Appeals authorized by prior acts may be made either under the conditions and regulations of the Summary Jurisdiction Act, 1879, or under those prescribed by the Act authorizing the appeal (*p*).

Fresh evidence may be given on the hearing of the appeal. The decision of the quarter sessions is by a majority of votes, and is pronounced by the chairman.

(*o*) 42 & 43 Vict. c. 49, s. 31.

(*p*) *Ibid.* s. 32.

Such decision is conclusive, though erroneous, unless a case is reserved for the consideration of the Queen's Bench Division.

Case for
opinion of
superior court.

Instead of the appeal of which notice has been given being heard by the quarter sessions, the parties may, by consent and order of any judge of the superior common law courts, state the facts of the case in the form of a special case for the opinion of the superior court, and agree to abide by its judgment, which will have the same effect as if given by the quarter sessions on appeal (g).

Resort to a
superior court.

ii. Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case setting forth the facts of the case, and the grounds on which the proceeding is questioned. And if the court decline to state the case, he may apply to the High Court of Justice for an order requiring the case to be stated (r). This resort to a superior court operates as an abandonment of the right of appeal to the quarter sessions (s). Certain conditions have also to be complied with. The application must be made as may be directed from time to time by rules under the Summary Jurisdiction Act, 1879. But until such rules are made, and subject thereto and to the Rules of Court under the Judicature Act, it must be made within three days after the decision of the magistrates, and the case must be transmitted to the superior court within three days after the appellant has obtained it, he giving due notice to the respondent. He must also enter into recognizances to prosecute the appeal with-

(g) 12 & 13 Vict. c. 45, s. 11.

(r) 42 & 43 Vict. c. 49, s. 33; 20 & 21 Vict. c. 43, s. 1.

(s) 20 & 21 Vict. c. 43, s. 14.

out delay, and to pay costs, and to appear to receive judgment, unless the decision is reversed (t).

When there is any fault or illegality in the commitment alone, the proper remedy is for the defendant to sue out a writ of *habeas corpus*, which will be directed to the gaoler in whose custody the defendant is. Irregular commitment.

The proceedings may be removed from the justices to the Queen's Bench Division, for the purpose of being examined by that court, by writ of *certiorari*. Certiorari. Unlike the qualified right of appeal, this right lies of course as a matter of common law, unless expressly taken away by statute. As no writ of error lies on summary convictions, this is the only mode in which a revision of these proceedings by the superior court can be obtained (u).

It will not be necessary to do more than mention that certain proceedings (in some cases civil, in some criminal) may be taken against justices for any irregularity or excess in their measures. Proceedings against magistrates. As to criminal steps, it may be stated generally that, "wherever the powers vested in justices for the summary execution of penal laws are exerted from corrupt or personal motives," the delinquent may be proceeded against by criminal information, and punished accordingly; but "an information is never granted for an irregularity arising merely from ignorance or mistake" (x).

In conclusion, we may again draw attention to the fact that the examination and punishment of offences in a summary manner by justices of the peace, without the intervention of a jury, is founded entirely upon a Summary jurisdiction depends entirely on statute.

(t) 20 & 21 Vict. c. 43, ss. 1, 2.

(u) Paley, Sum. Con. 423.

(x) Ibid. 506, 507.

special authority conferred and regulated by statute in the case of each offence. No new offence is cognizable in this manner, unless expressly made so by statute; if some statute does not authorize the summary proceeding, the offence must be dealt with in the ordinary way by indictment or information (y).

(y) Paley, Sum. Con. 15.

TABLE OF OFFENCES.

THEIR PUNISHMENTS, STATUTES, &c.

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THEIR PUNISHMENTS, STATUTES, &c.

OFFENCE.	FELONY OR MISDEMEANOR.	PENAL SERVITUDE.	IMPRISONMENT OR FINE.	PRINCIPAL STATUTES.	PAGE.
Offences against the Law of Nations :					
Piracy	Fel.	Life—5 yrs.	3 yrs.	{ 11 & 12 Wm. 3, c. 7 . . }	42
„ with violence	Fel.	Death.	...	{ 8 Geo. 1, c. 24 . . . }	
				{ 18 Geo. 2, c. 30 . . . }	
Slaves, conveying, &c.	Fel.	Life—5 yrs.	3 yrs.	{ 7 Wm. 4 & 1 Vict. c. 88 }	45
„ other offences as to	Fel. or Misd.	...	...	{ 5 Geo. 4, c. 113 . . . }
				{ 6 & 7 Vict. c. 98 . . . }	
				{ 36 & 37 Vict. c. 88 . . }	
Offences against the Government and Sovereign :					
Treason	Fel., v. p. 8.	Death.	...	{ 25 Ed. 3, st. 5, c. 2 . . }	46
				{ 7 & 8 Wm. 3, c. 3 . . . }	
				{ 1 Anne, st. 2, c. 17, s. 3 }	
				{ 6 Anne, c. 7 . . . }	46
				{ 7 Anne, c. 21, s. 11 . . }	
				{ 36 Geo. 3, c. 7 . . . }	
				{ 39 & 40 Geo. 3, c. 93 . . }	54
				{ 54 Geo. 3, c. 146 . . . }	
				{ 57 Geo. 3, c. 6 . . . }	
Attempt to alarm the Queen	Misd.	7—5 yrs.	3 yrs. (Whipping)	{ 11 & 12 Vict. c. 12 . . }	54
Treason-Felony	Fel.	Life—5 yrs.	2 yrs.	{ 5 & 6 Vict. c. 51 . . . }	
Sedition	Misd.	...	Fine & impr.	{ 11 & 12 Vict. c. 12 . . }	
Unlawful oaths against Government	Fel.	7—5 yrs.	...	{ 60 Geo. 3 & 1 Geo. 4, c. 9 }	56
„ to commit crimes	Fel.	Life—5 yrs.	3 yrs.	{ 11 Geo. 4 & 1 Wm. 4, c. 73 }	
Unlawful societies	Misd.	7—5 yrs.	2 yrs.	{ 37 Geo. 3, c. 123 . . . }	
Offences against Foreign Enlistment Act	Misd.	...	{ Forim. not exc. }	{ 52 Geo. 3, c. 104 . . . }	57
			{ 2 yrs., or both. }	{ 39 Geo. 3, c. 79 . . . }	
				{ 57 Geo. 3, c. 19 . . . }	
				{ 33 & 34 Vict. c. 90 . . }	58
					59

Desertion, Mutiny, &c. (v. pp. 61, 63) . . .	Fel.	Life—5 yrs.	3 yrs.	37 Geo. 3, c. 70 . . .	61
Illegal training and drilling . . .	Misd.	7—5 yrs.	2 yrs.	60 Geo. 3 & 1 Geo. 4, c. 1	62
Public stores, applying marks . . .	Misd.	...	2 yrs.	38 & 39 Vict. c. 25 . . .	62
" oblitterating marks . . .	Fel.	7—5 yrs.	2 yrs.	" " " " " " " "	62
<i>Coinage Offences</i> . . .					
Counterfeiting gold or silver of realm . . .	" Fel.	...	...	24 & 25 Vict. c. 99 . . .	64
" copper of realm or foreign gold or silver . . .	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 2 . . .	65
" foreign copper . . .	Misd.	7—5 yrs.	2 yrs.	Ibid. ss. 14, 18. . .	65
" " (second offence) . . .	Misd.	...	1 yr.	Ibid. s. 22 . . .	65
Colouring, &c., to represent gold or silver . . .	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 22 . . .	65
Impairing, &c., gold or silver . . .	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 3 . . .	66
Having clippings, &c.	Fel.	14—5 yrs.	2 yrs.	Ibid. s. 4 . . .	66
Defacing coin	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 5 . . .	66
Buying or selling counterfeit gold or silver . . .	Misd.	...	1 yr.	Ibid. s. 16 . . .	66
" " copper . . .	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 6 . . .	67
Importing counterfeit gold or silver . . .	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 14 . . .	67
" " foreign gold or silver . . .	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 7 . . .	67
Exporting coin	Misd.	7—5 yrs.	2 yrs.	Ibid. s. 19 . . .	67
Uttering—				Ibid. s. 8 . . .	67
counterfeit gold or silver	Misd.	...	1 yr.	Ibid. s. 9 . . .	68
if other counterfeit in possession, or other uttering within 10 days . . .	Misd.	...	2 yrs.	Ibid. s. 10 . . .	68
after certain previous convictions . . .	Misd.	Life—5 yrs.	2 yrs.	Ibid. s. 12 . . .	68
counterfeit foreign coin	Misd.	...	6 months.	Ibid. s. 20 . . .	68
second offence	Misd.	...	2 yrs.	Ibid. s. 21 . . .	68
third offence	Fel.	...	2 yrs.	Ibid. s. 21 . . .	68
spurious coin	Misd.	...	1 yr.	Ibid. s. 13 . . .	68
Having in possession—					
three or more pieces of counterfeit g. or s. . .	Misd.	5 yrs.	2 yrs.	Ibid. s. 11 . . .	68
" " after certain previous convictions . . .	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 12 . . .	69
" " of counterfeit copper . . .	Misd.	...	1 yr.	Ibid. s. 15 . . .	69
" " of counterfeit foreign coin . . .	Misd.	(Summary conviction.)		Ibid. s. 23 . . .	69
Making, &c., coining tools	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 24 . . .	69

Perjury and subornation	Misd.	7—5 yrs.	{ F. or im.; or im. } not ex. 7 yrs.	{ 9 Eliz. c. 9 2 Geo. 2, c. 25, s. 2 . . . 23 Geo. 2, c. 11 14 & 15 Vict. c. 100, } ss. 19-22	81
Voluntary oaths	Misd.	...	{ F. or im., or both } (v. p. 87)	{ 5 & 6 Wm. 4, c. 62, s. 13	86
False declarations	Misd.	...	{ F. and im. }	...	87
Bribery, of those in office	Misd.	...	{ F. and im. }	...	89
" in sale, &c., of offices	Misd.	...	{ F. and im. }	...	89
" at elections	Misd.	{ As to for- feiture, } { v. p. 94 }	{ F. and im. }	{ 49 Geo. 3, c. 126 . . . 17 & 18 Vict. c. 102 . . . 21 & 22 Vict. c. 87 . . . 26 Vict. c. 29 30 & 31 Vict. c. 102, s. 49 31 & 32 Vict. c. 125, } ss. 43-47 35 & 36 Vict. c. 60, s. 3 }	89
Corrupt practice other than personation	Misd.	{ As to for- feiture, } { v. p. 94 }	{ F. or im. }	{ 46 & 47 Vict. c. 51, s. 6	89
Personation	Fel.	{ As to for- feiture, } { v. p. 94 }	{ 2 yrs. }	{ 35 & 36 Vict. c. 53, s. } 24 { 46 & 47 Vict. c. 51, s. 6 }	89
Illegal practice	Misd.	{ As to for- feiture, } { v. p. 94 }	{ F. }	{ 46 & 47 Vict. c. 51, ss. } 7, 10	89
Embracery	Misd.	...	{ F. or im., or both }	{ 6 Geo. 3, c. 50, s. 61 .	95
Common Barratry	Misd.	...	{ F. or im., or both }	{ 12 Geo. 1, c. 29, s. 4 .	96
Maintenance	Misd.	...	{ F. or im., or both }	{ 8 Eliz. c. 2	97
Champerty	Misd.	...	{ F. or im., or both }	{	98
Compounding felony	Misd.	...	{ F. and im. }	{	98
(Taking reward to help to stolen property)	Fel.	7—5 yrs.	{ 2 yrs. }	{ 24 & 25 Vict. c. 96, ss. } 101, 102	99
Compounding misdemeanor without proper leave	Misd.	...	{ F. and im. }	{	100
Compounding informations on penal statutes without leave	Misd.	...	{ F. and im. }	{ 18 Eliz. c. 5 56 Geo. 3, c. 138, s. 2 }	100

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &c.—*continued*.

OFFENCE.	FELONY OR MISDEMEANOR.	PENAL SERVITUDE.	IMPRISONMENT OR FINE.	PRINCIPAL STATUTES.	PAGE.
Offences against Public Justice—<i>continued</i>.					
Misprision of felony	Misd.	...	F. or im., or both	...	101
Criminal dealings with records . . . . .	...	(v. p. 101.)		...	
Extortion, and other misconduct of officers of justice	Misd.	...	F. or im., or both	...	101
Contempt of court of justice . . . . .	...	...	F. or im., or both	...	103
Offences against the Public Peace :					
Riot, rout, or unlawful assembly	Misd.	...	F. or im., or both	{ v. 24 & 25 Vict. c. 97, { ss. 11, 12 }	106
under Riot Act	Fel.	Life—5 yrs.	3 yrs.	1 Geo. 1, st. 2, c. 5 .	108
Affray	Misd.	...	F. or im., or both	...	109
Challenge to fight	Misd.	...	F. or im., or both	...	110
Threatening, sending letter, &c.	Fel.	10—5 yrs. { Life—5 yrs. { yrs. (5, if threat not by letter.) Life—5 yrs.	2 yrs.	{ 24 & 25 Vict. c. 97, s. { 50; c. 100, s. 16 . }	110
“ extorting by	Fel.		2 yrs.	24 & 25 Vict. c. 96, s. 44	110
Accusing of crime, extorting by	Fel.		{ 2 yrs. F. or im., or both.	Ibid. ss. 46, 47 . .	111
Libel, defamatory	Misd.	...	{ Length of (im. v. p. 118.) 3 yrs.	{ 32 Geo. 3, c. 60. . . { 6 & 7 Vict. c. 96, ss. 3-10 }	111
“ to extort money	Misd.	...		6 & 7 Vict. c. 96, s. 3	118
“ v. Seditious, blasphemous libels, <i>supra</i>					
Forcible entry or detainer	Misd.	...	F. or im., or both	21 Jac. 1, c. 15 . .	119

Offences against Trade :

Smuggling—three or more armed and assembled shooting at vessels, wounding officers, &c.
 " six or more together, two or more armed or disguised
 " assaulting or opposing officer
 " making signals, &c.

Fel.
 Fel.
 Fel.
 Misd.
 Misd.

Life—15 yrs.
 Life—15 yrs.
 7—5 yrs.
 7—5 yrs.
 ...

3 yrs.
 3 yrs.
 ...
 2 yrs.
 £100 or 1 yr.

16 & 17 Vict. c. 107, s. 248
 Ibid. s. 249 . . .
 Ibid. s. 250 . . .
 Ibid. s. 251 . . .
 Ibid. s. 244 . . .
 { (v. also ss. 268, 269 ;
 275—277 ; 301—308.) }

120
 121
 121
 121
 121
 121

Bankrupt Laws, offences against

{ Misd.
 { Fel. s. 12 }

...

{ In some cases
 2 yrs.
 In others 1 yr.
 { F. or im. not ex.
 } 2 yrs., or both }

32 & 33 Vict. c. 62 .

122

Counterfeiting trade-marks

Misd.

...

{ F. or im. not ex.
 } 2 yrs., or both }

25 & 26 Vict. c. 88 .
 38 & 39 Vict. c. 91 .
 { 24 & 25 Vict. c. 100,
 ss. 39, 40
 34 & 35 Vict. c. 31, s. 2
 } 38 & 39 Vict. c. 86 .

125
 126

Unlawful interference with trade

{ Misd.
 { or Sum.
 } Conv.

...

3 months or £20

14 & 15 Vict. c. 100, s. 12
 24 & 25 Vict. c. 100, s. 4

130
 131

Conspiracy :

in ordinary cases
 to murder

Misd.
 Misd.

...
 10—5 yrs.

F. or im., or both
 2 yrs.

14 & 15 Vict. c. 100, s. 12
 24 & 25 Vict. c. 100, s. 4

130
 131

Offences against Public Morals, Health, &c. :

Bigamy
 Indecent conduct (v. Assault)
 Gaming, cheating at
 " in highways
 Gaming-house, keeping
 Nuisance, common or public
 Adulteration of provisions (second offence)
 Furious driving

Fel.
 Misd.
 Misd.
 ...
 Misd.
 Misd.
 Misd.
 Misd.

7—5 yrs.
 ...
 5 yrs.
 (v. Vagrancy)
 ...
 ...
 ...
 ...
 ...

2 yrs.
 F. or im., or both
 2 yrs.
 or penalty.
 F. or im., or both
 F. or im., or both
 6 months
 2 yrs. or f., or both

24 & 25 Vict. c. 100, s. 57
 { 14 & 15 Vict. c. 100,
 ss. 25—29
 20 & 21 Vict. c. 83 .
 8 & 9 Vict. c. 109, s. 17
 36 & 37 Vict. c. 38, s. 3
 (v. p. 138)
 ...
 38 & 39 Vict. c. 63 .
 24 & 25 Vict. c. 100, s. 35

135
 137
 137
 138
 138
 138
 140
 143
 144

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &c.—continued.

OFFENCE.	FELONY OR MISDEMEANOR.	PEMAL SERVITUDE.	IMPRISONMENT OR FINE.	PRINCIPAL STATUTES.	PAGE.
<i>Assaults, &c.—continued.</i>					
Forcing or leaving seamen on shore	Misd. } or Sum. } Conv.	...	F. or i., or both.	{ 17 & 18 Vict. c. 104, } ss. 206, 207, 518 . }	195
Assault on peace officer, &c.	Misd.	...	2 yrs.	24 & 25 Vict. c. 100, s. 38	195
" clergyman on duty	Misd.	...	2 yrs.	Ibid. s. 36	196
" gamekeeper	Fel.	5 yrs.	2 yrs.	24 & 25 Vict. c. 96, s. 16	149
" apprentices and servants	Misd.	5 yrs.	2 yrs.	24 & 25 Vict. c. 100, s. 26	196
" lunatic	Misd. } or Sum. } Conv.	...	F. or i., or both.	{ 16 & 17 Vict. c. 96, s. 9; } c. 97, s. 123 . . . }	196
" with intent to rob, v. <i>infra</i> .					
" indecent, v. <i>supra</i> .					
" in violation of trade, v. <i>supra</i> .					
False imprisonment	Misd.	...	F. or i., or both.	{ 23 & 24 Vict. c. 75, s. 3 }	197
<i>Larceny:</i>					
Simple larceny	Fel.	5 yrs.	2 yrs.	24 & 25 Vict. c. 96, s. 4	198
" after previous conviction . . .	Fel.	10—5 yrs.	2 yrs.	Ibid. s. 7	219
" indictable misdemeanor } after previous conviction for } indictable misdemeanor } under Larceny Act	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 8	219
" after two summary convictions	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 8	219
Larceny by bailees	Fel.	5 yrs.	2 yrs.	Ibid. s. 3	212
" by husband or wife of the other's } goods }		v. pp. 215 and 216.		{ 45 & 46 Vict. c. 75, ss. } 12, 16 }	
" by tenants or lodgers	Fel.	{ 7—5 yrs. } if value } above £5 }	2 yrs.	24 & 25 Vict. c. 96, s. 74	219

Larceny by clerks or servants					Ibid. s. 67	219
" by public officers					Ibid. s. 69	221
Stealing, &c. materials of buildings or fixtures from mines		14-5 yrs.	2 yrs.		Ibid. s. 31	201
" trees, &c., in garden, &c., to value of £1, or elsewhere to value of £5 trees, &c., to value of £1 after two summary convictions		5 yrs.	2 yrs.		Ibid. ss. 38, 39	201
" plants, &c., in garden, &c., after summary conviction		5 yrs.	2 yrs.		Ibid. s. 32	201
" deeds, &c.		5 yrs.	2 yrs.		Ibid. s. 32	201
" bonds, bills, notes, and other valu- able securities		5 yrs.	2 yrs.		Ibid. s. 36	202
" wills		5 yrs.	2 yrs.		Ibid. s. 28	202
" records		(v. p. 202.)			Ibid. s. 27	202
" animals		Life-5 yrs.	2 yrs.		Ibid. s. 29	203
" deer in inclosed place, or after pre- vious conviction in uninclosed		5 yrs.	2 yrs.		Ibid. s. 30	204
" hares, &c., in warren at night . . . . .		...	2 yrs.		{ v. 43 & 44 Vict. c. 35; } { and 44 & 45 Vict. c. 51 }	
" fish in certain waters . . . . .		...	F. or im., or both.		Ibid. ss. 12, 13	205
" oysters from fishery . . . . .		...	F. or im., or both.		Ibid. s. 17	205
" dogs, after previous summary con- viction		5 yrs.	2 yrs.		Ibid. s. 24	206
" horse, cow, sheep, &c. . . . .		...	18 months.		Ibid. s. 26	206
" certain goods in process of manufac- ture		(Same consequences attend having posses- sion of dog, or taking money to restore, &c.)			Ibid. s. 18	206
" from vessels, docks, &c.		14-5 yrs.	2 yrs.		Ibid. ss. 19, 20	206
" from wrecks, &c.		14-5 yrs.	2 yrs.		Ibid. s. 10	207
Robbery		(Killing with intent to steal skin, &c., of above, v. p. 207.)			Ibid. s. 11	207
		14-5 yrs.	2 yrs.		Ibid. s. 62	220
		14-5 yrs.	2 yrs.		Ibid. s. 63	221
		14-5 yrs.	2 yrs.		Ibid. s. 64	221
		14-5 yrs.	2 yrs.		Ibid. s. 40	222

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &c.—continued.

OFFENCE.	FELONY OR MISDEMEANOR.	PENAL SERVITUDE.	IMPRISONMENT OR FINE.	PRINCIPAL STATUTES.	PAGE.
Offences against Public Morals, Health, &c.—<i>contd.</i>					
Vagrancy, idle and disorderly . . . . .	...	...	1 month	{ 5 Geo. 4, c. 83	144
" rogue and vagabond . . . . .	...	...	3 months	{ 1 & 2 Vict. c. 38	145
" incorrigible rogue . . . . .	...	...	1 yr.		146
Drunkenness . . . . .	...	(Summary Conviction.)			146 n.
Unseaworthy ship, sending to sea	Misd.	...	F. or im., or both	38 & 39 Vict. c. 88, s. 4	147
Offences relating to Game :					
Taking, &c., by night after two sum. convictions	Misd.	7—5 yrs.	2 yrs.	9 Geo. 4, c. 69	148
Assaulting officers, when committing, &c.	Misd.	7—5 yrs.	2 yrs.	7 & 8 Vict. c. 29	149
Three or more armed entering, &c.	Misd.	14—5 yrs.	2 yrs.	25 & 26 Vict. c. 114	149
Taking hares or rabbits by night	Misd.	...	F. or im., or both	24 & 25 Vict. c. 96, s. 17	150
" deer (v. p. 150)	Fel.	...	2 yrs.	Ibid. ss. 12, 13	150
Spring guns, &c., setting	Misd.	5 yrs.	2 yrs.	24 & 25 Vict. c. 100, s. 31	150
Homicide :					
Murder	Fel.	Death.	...	24 & 25 Vict. c. 100, s. 1	163
" accessory after the fact	Fel.	Life—5 yrs.	2 yrs. f. in	Ibid. s. 67	168
Manslaughter	Fel.	Life—5 yrs.	{ 2 yrs. f. in addition or in lieu	Ibid. s. 5	169
Attempt to murder	Fel.	Life—5 yrs.	2 yrs.	Ibid. ss. 11, 15	175
v. also Conspiracy	Fel.	Life—5 yrs.			
Rape, &c. :					
Rape	Fel.	Life—5 yrs.	2 yrs.	Ibid. ss. 48, 63	179
Carnally abusing children under twelve	Fel.	Life—5 yrs.	2 yrs.	38 & 39 Vict. c. 94	181
" " under thirteen	Misd.	...	2 yrs.	Ibid	181

Procuring defilement, &c.	Misd.	...	2 yrs.	24 & 25 Vict. c. 100, s. 49	181
Indecent assault, attempt, &c.	Misd.	...	2 yrs.	Ibid. s. 52 . . .	181
Unnatural crime	Fel.	Life—10 yrs.	...	Ibid. s. 61 . . .	182
" "	Misd.	10—5 yrs.	2 yrs.	Ibid. s. 62 . . .	182
Abortion, attempt to procure	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 58 . . .	182
" " supplying poison, &c., for	Misd.	5 yrs.	2 yrs.	Ibid. s. 59 . . .	183
Concealment of birth	Misd.	...	2 yrs.	Ibid. s. 60 . . .	183
Abduction for fortune; or by force with intent, &c.	Fel.	14—5 yrs.	2 yrs.	Ibid. ss. 53, 54 . .	184
Abduction of girl under sixteen	Misd.	...	2 yrs.	Ibid. s. 55 . . .	185
Child stealing	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 56 . . .	185
" exposing	Misd.	5 yrs.	2 yrs.	Ibid. s. 57 . . .	186
Assaults, &c.					
Common assault	Misd.	(Usually sum. con.)	1 yr.	Ibid. ss. 42, 47 . .	187
Actual bodily harm	Misd.	5 yrs.	2 yrs.	Ibid. s. 47 . . .	190
Grievous bodily harm	Misd.	5 yrs.	2 yrs.	Ibid. s. 20 . . .	191
" " with intent to maim, resist apprehension, &c.	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 18 . . .	191
Assault with intent to commit felony	Misd.	...	2 yrs.	Ibid. s. 38 . . .	192
Attempt to choke, &c., with intent, &c.	Fel.	Life—5 yrs.	2 yrs. (Whipping.)	Ibid. s. 21 . . .	192
Administering chloroform, &c., with intent, &c.	Fel.	Life—5 yrs.	2 yrs.	26 & 27 Vict. c. 44 . .	192
" " poison, so as to endanger, &c.	Fel.	Life—5 yrs.	2 yrs.	24 & 25 Vict. c. 100, s. 22	192
" " poison, with intent, &c.	Fel.	10—5 yrs.	2 yrs.	Ibid. ss. 23, 25 . .	193
By explosion, &c. to do grievous bodily harm	Fel.	5 yrs.	2 yrs.	Ibid. ss. 24, 25 . .	193
Explosion with intent	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 28 . . .	193
Placing gunpowder, &c., near buildings, ships, &c., with intent	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 29 . . .	193
Endangering safety of railway passengers by certain acts	Fel.	14—5 yrs.	2 yrs.	Ibid. s. 30 . . .	193
" " otherwise	Fel.	Life—5 yrs.	2 yrs.	Ibid. ss. 32, 33 . .	194
Assault on officer, &c., preserving wreck	Misd.	...	2 yrs.	Ibid. s. 34 . . .	194
Impeding escape from wreck	Misd.	7—5 yrs.	2 yrs.	Ibid. s. 37 . . .	195
	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 17 . . .	195

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &c.—*continued*.

OFFENCE.	FELONY OR MISDEMEANOR.	PENAL SERVITUDE.	IMPRISONMENT OR FINE.	PRINCIPAL STATUTES.	PAGE.
Assaults, &c.—<i>continued</i>.					
Forcing or leaving seamen on shore. . . .	{ Misd. } or Sum. Conv.	...	F. or i., or both.	{ 17 & 18 Vict. c. 104, } sa. 206, 207, 518. }	195
Assault on peace officer, &c.	Misd.	...	2 yrs.	24 & 25 Vict. c. 100, s. 38	195
" clergyman on duty	Misd.	...	2 yrs.	Ibid. s. 36	196
" gamekeeper	Fel.	5 yrs.	2 yrs.	24 & 25 Vict. c. 96, s. 16	149
" apprentices and servants	Misd.	5 yrs.	2 yrs.	24 & 25 Vict. c. 100, s. 26	196
" lunatic	{ Misd. } or Sum. Conv.	...	F. or i., or both.	{ 16 & 17 Vict. c. 96, s. 9; } c. 97, s. 123 . . . }	196
" with intent to rob, v. <i>infra</i> .	Misd.	...	F. or i., or both.	... ..	197
" indecent, v. <i>supra</i> .					
" in violation of trade, v. <i>supra</i> .					
False imprisonment					
Larceny:					
Simple larceny	Fel.	5 yrs.	2 yrs.	24 & 25 Vict. c. 96, s. 4	198
" after previous conviction . . .	Fel.	10—5 yrs.	2 yrs.	Ibid. s. 7	219
" after previous conviction for indictable misdemeanor under Larceny Act	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 8	219
" after two summary convictions	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 8	219
Larceny by bailies	Fel.	5 yrs.	2 yrs.	Ibid. s. 3	212
" by husband or wife of the other's goods		v. pp. 215 and 216.		{ 45 & 46 Vict. c. 75, sa. } 12, 16 }	
" by tenants or lodgers	Fel.	{ 7—5 yrs. } if value above £5	2 yrs.	24 & 25 Vict. c. 96, s. 74	219

TABLE OF OFFENCES.

Larceny by clerks or servants				Ibid. s. 67	219
" by public officers				Ibid. s. 69	221
Stealing, &c. materials of buildings or fixtures				Ibid. s. 31	201
" from mines				Ibid. ss. 38, 39	201
" trees, &c., in garden, &c., to value				Ibid. s. 32	201
" of £1, or elsewhere to value of £5					
" trees, &c., to value of £1 after two					
" summary convictions					
" plants, &c., in garden, &c., after				Ibid. s. 32	201
" summary conviction					
" deeds, &c.				Ibid. s. 36	202
" bonds, bills, notes, and other valu-				Ibid. s. 28	202
" able securities				Ibid. s. 27	202
" wills				Ibid. s. 29	203
" records				Ibid. s. 30	204
" animals				{ v. 43 & 44 Vict. c. 35; }	
" deer in inclosed place, or after pre-				{ and 44 & 45 Vict. c. 51 }	
" vious conviction in uninclosed					
" hares, &c., in warren at night				Ibid. ss. 12, 13	205
" fish in certain waters				Ibid. s. 17	205
" oysters from fishery				Ibid. s. 24	206
" dogs, after previous summary con-				Ibid. s. 26	206
" viction				Ibid. s. 18	206
" horse, cow, sheep, &c.					
" certain goods in process of manufac-				Ibid. ss. 19, 20	206
" ture				Ibid. s. 10	207
" from vessels, docks, &c.				Ibid. s. 11	207
" from wrecks, &c.					
Robbery				Ibid. s. 62	220
				Ibid. s. 63	221
				Ibid. s. 64	221
				Ibid. s. 40	222

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &c.—continued.

OFFENCE.	FELONY OR MISDEMEANOR.	PENAL SERVITUDE.	IMPRISONMENT OR FINE.	PRINCIPAL STATUTES.	PAGE.
Larceny—continued.					
Robbery with violence	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 43	224
" by person armed	Fel.	Life—5 yrs.	2 yrs.	26 & 27 Vict. c. 44	224
" by two or more	Fel.	Life—5 yrs.	2 yrs.	24 & 25 Vict. c. 96, ss. 41, 42	224
Assault with intent to rob	Fel.	5 yrs.	2 yrs.	Ibid. s. 43	225
" by person armed, or by two or more	Fel.	Life—5 yrs.	2 yrs.	26 & 27 Vict. c. 44	225
Stealing from the person	Fel.	14—5 yrs.	2 yrs.	24 & 25 Vict. c. 96, s. 40	225
Post Office larceny, &c.	Fel.	(v. pp. 226, 227.)	2 yrs.	7 Wm. 4 & 1 Vict. c. 36	226
Receiving stolen goods, where principal offence a felony, &c.	Fel.	14—5 yrs.	2 yrs.	24 & 25 Vict. c. 96, s. 91	228
" where a misdemeanor	Misd.	7—5 yrs.	2 yrs.	Ibid. s. 95	230
" where punishable on summary conviction		Summary conviction.		... ..	230
Extortion by threats, &c., v. <i>supra</i> .					
Embezzlement:					
Embezzlement by bankers, factors, attorneys, &c.	Fel.	14—5 yrs.	2 yrs.	24 & 25 Vict. c. 96, ss. 67, 73	233
" by trustees	Misd.	7—5 yrs.	2 yrs.	Ibid. ss. 75—87	237
" by directors, &c., of public companies	Misd.	7—5 yrs.	2 yrs.		239
Falsification of accounts	Misd.	7—5 yrs.	2 yrs.	38 & 39 Vict. c. 24	239
False Pretences, &c.:					
Obtaining by false pretences	Misd.	5 yrs.	2 yrs.	24 & 25 Vict. c. 96, ss. 88, 89	242
Inducing by fraud, execution, &c., of valuable securities	Misd.	5 yrs.	2 yrs.	Ibid. s. 90	246

False personation to obtain property	Fel.	Life—5 yrs.	2 yrs.	37 & 38 Vict. c. 36	247
" of seamen	Misd.	5 yrs.	2 yrs.	28 & 29 Vict. c. 124, ss. 8, 9	246
" of soldiers	Fel.	Life—5 yrs.	2 yrs.	2 & 3 Wm. 4. c. 53, s. 49	246
" of owners of stock	Fel.	Life—5 yrs.	2 yrs.	24 & 25 Vict. c. 98, s. 3	247
" bail	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 34	248
Cheating	Misd.	...	F. or im., or both	... ..	248
Burglary, &c. :					
Burglary	Fel.	Life—5 yrs.	2 yrs.	{ 24 & 25 Vict. c. 96, ss.	250
Entering house at night with intent, &c.	Fel.	7—5 yrs.	2 yrs.	{ 51—53	255
Being found at night armed with intent, &c.				Ibid. s. 54	
" " breaking instrument, &c.	Misd.	{ 5 yrs.	2 yrs.	Ibid. ss. 58, 59	255
" " in building with intent, &c.		{ (After prev. conv., v. p. 255.)			
Housebreaking	Fel.	14—5 yrs.	2 yrs.	Ibid. ss. 55, 56	256
" if intended felony not committed	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 57	256
Sacrilege	Fel.	Life—5 yrs.	2 yrs.	Ibid. s. 50	256
" if intended felony not committed	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 57	257
Larceny in dwelling-house to amount of £5	Fel.	14—5 yrs.	2 yrs.	Ibid. s. 60	257
" " to any amount, if				Ibid. s. 61	257
" " bodily fear, &c.	Fel.	14—5 yrs.	2 yrs.		
Forgery :					
According to the nature of the instrument	Fel.	{ Life—5 yrs.	2 yrs.	{ 24 & 25 Vict. c. 98	261
forged (v. pp. 262, 264)		{ 14—5 yrs.	2 yrs.	{ (v. p. 264)	
At Common Law (i.e., of instruments not pro-		{ 7—5 yrs.	2 yrs.		
vided for by statute)	Misd.	...	F. or im., or both	... ..	265
As to <i>Eschequer Bills, Bonds, &c.</i>					
Making, &c., plates, implements, &c.	Fel.	7—5 yrs.	2 yrs.	Ibid. s. 9	270

Houses, throwing gunpowder, &c., on, with intent, &c.	Fel.	14-5 yrs.	2 yrs.	Ibid. s. 10 . . .	278
" by demolishing, &c.	Fel.	Life-5 yrs.	2 yrs.	Ibid. s. 11 . . .	279
" by damaging, &c.	Misd.	7-5 yrs.	2 yrs.	Ibid. s. 12 . . .	279
" tenant demolishing, &c.	Misd.	...	F. or im., or both	Ibid. s. 13 . . .	279
Manufactures, certain goods in process of, or the machinery . . .	Fel.	Life-5 yrs.	2 yrs.	Ibid. s. 14 . . .	279
Machines of other kinds . . .	Fel.	7-5 yrs.	2 yrs.	Ibid. s. 15 . . .	279
Mines, and their engines, &c. . .	Fel.	7-5 yrs.	2 yrs.	Ibid. ss. 28, 29. . .	280
Vessels, by explosion, with intent, &c. . .	Fel.	14-5 yrs.	2 yrs.	24 & 25 Vict. c. 97, s. 45	280
" otherwise . . .	Fel.	7-5 yrs.	2 yrs.	Ibid. s. 46 . . .	280
" altering signals, or otherwise endangering . . .	Fel.	Life-5 yrs.	2 yrs.	Ibid. s. 47 . . .	280
" interfering with buoys . . .	Fel.	7-5 yrs.	2 yrs.	Ibid. s. 48 . . .	281
" wrecked, &c. . .	Fel.	14-5 yrs.	2 yrs.	Ibid. s. 49 . . .	281
Sea and river banks . . .	Fel.	Life-5 yrs.	2 yrs.	Ibid. s. 30 . . .	281
Cutting piles, opening sluices, &c. . .	Fel.	7-5 yrs.	2 yrs.	Ibid. s. 31 . . .	281
Bridges, viaducts, and aqueducts . . .	Fel.	Life-5 yrs.	2 yrs.	Ibid. s. 33 . . .	281
Turnpikes, &c. . .	Misd.	...	F. or im., or both	Ibid. s. 31 . . .	281
Walls, gates, &c. . .	(Summary conviction.)	...		... . .	282
Railways, with intent to obstruct . . .	Fel.	Life-5 yrs.	2 yrs.	Ibid. s. 35 . . .	282
" obstructing by unlawful act . . .	Misd.	...	2 yrs.	Ibid. s. 36 . . .	282
Telegraphs . . .	(Misd. } or Sum. } Conv.)	...	2 yrs.	Ibid. s. 37 . . .	282
Ponds, fish, &c. . .	Misd.	7-5 yrs.	2 yrs.	Ibid. s. 32 . . .	282
Animals, kill, maim, &c., cattle . . .	Fel.	14-5 yrs.	2 yrs.	{ 36 & 37 Vict. c. 71, s. 13 } 24 & 25 Vict. c. 97, s. 40	283
" " " others . . .	(Summary conviction.)	...		... . .	283
" ill-treat, torture, &c. . .	Misd.	...	F.	{ 12 & 13 Vict. c. 92, ss. } 12, 13 . . .	283
Trees, &c., in parks, to value of £1; else-where to value of £5 . . .	Fel.	5 yrs.	2 yrs.	{ 24 & 25 Vict. c. 97, ss. } 20, 21; and 42 & 43 Vict. c. 49, ss. 20-23	284
" to value of 1s. (third offence) . . .	Misd.	...	2 yrs.	24 & 25 Vict. c. 97, s. 22	284
" Plants, &c., in garden, &c. (second offence) .	Fel.	5 yrs.	2 yrs.	Ibid. s. 24 . . .	284

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &c. *continued.*

OFFENCE.	FELONY OR MISDEMEANOR.	PENAL SERVITUDE.	IMPRISONMENT OR FINE.	PRINCIPAL STATUTES.	PAGE.
Injuries to Property—<i>continued.</i>					
<i>Malicious injury to—</i>					
Hopbinds	Fel.	14—5 yrs.	2 yrs.	24 & 25 Vict. c. 97, s. 19	285
Works of art, &c.	Misd.	...	6 months.	Ibid. s. 39	285
Other injuries exceeding £5	Misd.	...	2 yrs.	Ibid. s. 51	285
" " " at night	Misd.	5 yrs.	2 yrs.	Ibid. s. 51	285
" " below that amount		(Summary conviction.)		... ..	285
Making or having in possession, dangerous thing or instrument, with intent to commit a felony under the Act	Misd.	...	2 yrs.	Ibid. s. 54	286

APPENDIX.

CODIFICATION OF THE CRIMINAL LAW.

MUCH has been said and written lately about the proposed Codification. Codification of the Criminal Law. At times it has seemed as if the project would soon become an accomplished fact. But then again circumstances have interfered to indefinitely defer the matter.

In prospect of future legislation, it will be well to briefly review the history of the scheme. But before doing this some explanation should be given of the term "Codification." Various erroneous ideas have been abroad as to the danger of the proposed change. Fears have been expressed that the law would be deprived of its *elasticity* and so on. In answer to such objections, the Commission of 1878, appointed to inquire into the question of Codification, thus explained its object and effect :—

Definition of the term.

"Codification merely means the reduction of the existing law to an orderly written system, freed from the needless technicalities, obscurities, and other defects which the experience of its administration has disclosed" (a).

Any code that might be established would of course be open from time to time to modifications and additions.

The question whether the reduction of the criminal law of England, written and unwritten, into one code, is either desirable or practicable, is one which has been much considered (b).

History of attempts at codification.

In the years 1833, 1836, 1837, three different Com-

(a) Report of Commission, p. 7.

(b) Ibid. p. 5.

missions were issued, under which eight Reports were made.

In the year 1845 a fourth Commission was issued, under which five Reports were made. In the fourth of these there is the draft of a bill for consolidating into one statute the written and unwritten law relating to the definition of crimes and punishments. This bill was introduced to the House of Lords by Lord Brougham, but was not proceeded with.

In the year 1852, Lord Chancellor St. Leonards gave directions for the preparing separate bills for the codification of the criminal law on separate subjects. One bill for the codification of the law as to Offences against the Person, was prepared and introduced to the House of Lords, and referred to a Select Committee. But on a change of Government the matter dropped.

In the year 1853, Lord Chancellor Cranworth sent a copy of the above-named bill to the judges, requesting their opinion on it. Their opinions were unfavourable. In reply to these criticisms, the Lord Chancellor received a memorandum from Messrs. Greaves and Lonsdale, who had prepared the bill.

The plan of codification was abandoned by Lord Cranworth. But eight bills were prepared under his direction ; and after much consideration, nine other bills were prepared in the year 1856. Of these last, seven became, with some alteration, the Acts well known as Greaves' Consolidation Acts (24 & 25 Vict. cc. 94-100). But they made no attempt at codification.

Legislation,
1878-1880.

Recently the matter of codification has assumed a more definite shape. In the year 1878 a Criminal Code was prepared by Sir James Fitzjames Stephen, and presented to the House. A bill for establishing the Criminal Code was read a second time, but was shortly after withdrawn.

Commission of
1878.

After this withdrawal, it was thought advisable to submit the bill to a thorough and exhaustive examination and review. Thereupon a Commission was appointed—the

Commissioners being Lord Blackburn, Mr. Justice Lush, Mr. Justice Barry, and Sir James Fitzjames Stephen. These Commissioners sent letters inviting suggestions and comments to the judges, chairmen, and deputy-chairmen of quarter sessions, recorders, and others conversant with the theory and practice of the criminal law. The Report of the Commission was presented to the House of Commons in June 1879, and was ordered by them to be printed. The Commissioners declare their object to be to frame a code, including, as far as practicable, all those crimes, whether at common law or by statute, which in the ordinary course of affairs come to be tried in the courts of criminal justice.

They recommend that certain classes of cases should be left untouched, viz:—

1. A certain number of statutes creating indictable offences, which are rather monuments of the political and religious struggles of former times, than parts of the ordinary criminal law, *e.g.*, 1 Eliz. c. 2, which punishes “depraving or despising the Book of Common Prayer,” on a third conviction, by imprisonment for life.

2. A certain number of statutes creating indictable offences which cannot perhaps be said to be obsolete, but which were passed under special circumstances, and which are seldom, if ever, enforced, *e.g.*, 21 Geo. 3, c. 49, the Lord’s Day Observance Act, which declares certain places opened for amusements or discussions on Sundays to be disorderly houses.

3. Many statutes which create indictable offences are of so special a nature, and are so closely connected with branches of law which have little or nothing to do with crimes, commonly so called, *e.g.*, Merchant Shipping Acts, 17 & 18 Vict. c. 104, &c.

4. A large number of statutes contain clauses of a penal nature intended to sanction their other provisions, and are scarcely intelligible apart from them: *e.g.*, the Acts which establish certain prisons give special powers to the keepers of the prison, and subject the prisoners to special punishments for particular offences.

5. The Peace Preservation Acts relating to Ireland.

6. The statute, commonly called the "Whiteboy Act," intended to repress offences springing from a peculiar state of society (c).

Criminal Code
Bill, 1879.

Meanwhile a bill had been brought into the House of Commons termed the Criminal Code (Indictable Offences) Bill. It was read a second time, subjected to the criticisms of Lord Chief Justice Cockburn, whose remarks were received and printed by the House, and finally withdrawn on July 14, 1879 (d). The Lord Chief Justice unsparingly pointed out the defects of the bill, though he had been long "a firm believer in not only the expediency and possibility, but also in the coming necessity of codification."

Legislation of
1880.

We now come to the legislation of the year 1880. On the 6th of February in that year, two bills were introduced into the House of Commons. One to be cited as "the Criminal Code," was prepared and brought in by Mr. Attorney-General, Mr. Solicitor-General, and Mr. Attorney-General for Ireland. Its title was "A Bill to Establish a Code of Offences for England and Ireland, and to prescribe the Procedure by Indictment for the Punishment of Offences" (e).

The other bill was to be cited as "the Criminal Code (No. 2)," and was prepared and brought in by three private members.

Chief alterations
proposed.

The Government Bill was read a second time and referred to a select committee (f). The Attorney-General, on moving the second reading, mentioned the chief alterations which the measure would bring about. It will be interesting to notice these:—

1. The abolition of the distinction between felony and misdemeanor, which would get rid of a number of very absurd and monstrous consequences.

2. The introduction of certain amendments into the law with regard to the doctrine of compulsion and coercion.

(c) Report, p. 12.
(d) 245 Hans. 310, 1750.
(e) 250 Hans. 244.
(f) Ibid. 1236.

3. The improvement of the law of homicide, which involved the extinction of the universally condemned doctrine of constructive malice.

4. The simplification of law relating to theft and fraud.

These were the proposed alterations in the first part of the bill. In the second part the following were the principal :—

1. Provisions getting rid of the absurdities arising under the existing law from the doctrine of venue.

2. Provisions for changing the place of trial when necessary.

3. Provisions for the trial of criminals by special juries in cases of exceptional difficulty.

4. Provisions for the simplification of indictments.

5. Provisions for the keeping of a simple record of the proceedings, and the sweeping away of technicalities which rendered proceedings by way of writ of error next door to impossible.

6. Enactments as to juries and the challenging of jurors.

7. Provisions enabling the jury to have a view when required.

8. Provisions giving a more satisfactory appeal in criminal cases upon points of law.

9. Enactments enabling prisoners in proper cases to obtain new trials.

10. Provisions altering the law to a considerable extent as to the costs of prosecutions (*g*).

Parliament being dissolved soon after the second reading, legislation was necessarily again deferred. In the new Parliament the subject of the Criminal Code was mentioned. A question was asked which drew from the Attorney-General the answer that the Government had no intention during that session to introduce a bill for the

codification of the criminal law, "as it would be impossible to make satisfactory progress with any such measure" (h).

It has been more than once proposed that the code should be dealt with and established piecemeal; portions of the whole being brought forward in successive sessions. But not unlikely in such a case the code itself would need codifying.

Analysis of
Code.

In order that the reader may understand the form which a Criminal Code will take, subjoined is the skeleton of the code contained in the Government Bill of 1880:—

I. *Introductory Provisions.*

1. Preliminary.
2. Punishments.
3. Matters of Justification or Excuse.
4. Parties to the Commission of Offences.

II. *Crimes against Public Order—Internal and External.*

5. Treason and other Offences against the Queen's Authority and Person.
6. Unlawful Assemblies, Riots, Breaches of the Peace.
7. Seditious Offences.
8. Piracy.

III. *Crimes affecting the Administration of Law and Justice.*

9. Corruption and Disobedience.
10. Misleading Justice.
11. Escapes and Rescues.

IV. *Crimes against Religion, Morals, and Public Convenience.*

12. Crimes against Religion.
13. Crimes against Morality.
14. Nuisances.

V. Crimes against the Person and Reputation.

15. Duties tending to the Preservation of Life.
16. Homicide.
17. Murder, Manslaughter, &c.
18. Bodily Injuries, and Acts causing Danger to the Person.
19. Assaults.
20. Rape and procuring Abortion.
21. Crimes affecting Conjugal and Parental Rights
—Bigamy—Abduction.
22. Crimes by Parents, Guardians, and Masters.
23. Defamatory Libel.

VI. Crimes against Rights of property.

Crimes involving Dishonesty defined.

24. Theft defined.
25. Punishment of Theft.
26. Fraud.
27. Robbery and Extortion.
28. Burglary and Housebreaking.
29. Receiving Stolen Goods.
30. Forgery.
31. Preparation for Forgery.
32. Personation.
33. Crimes relating to the Coin.
34. Mischief.
35. Fraudulent Debtors.
36. Threatening and attempting to commit Crimes.

VII. Procedure.

37. General Provisions.
38. Procedure in particular Cases.
39. Compelling Appearance of Accused before Justice.

- 40. Procedure on Appearance of Accused.
- 41. Place and Mode of Trial.
- 42. Indictments.
- 43. Preferring Indictment.
- 44. Trial.
- 45. Appeal.
- 46. Costs—Restitution of Property.
Schedule—Forms.

INDEX.

A.

ABANDONING CHILDREN, 185

ABATEMENT,

demurrer in, 383

plea in, 377

ABATEMENT OF NUISANCE, 141

ABDUCTION, 184

of woman on account of her fortune, 184

by force with intent to marry, 184

of girl under sixteen, 185

knowledge of age, 185

ABETTERS, 35, n.

ABOMINABLE: *v.* UNNATURAL CRIME.

ABORTION: *v.* MISCARRIAGE.

ABSCONDING BANKRUPT, 123

ACCESSORY,

distinguished from principal, 35

before the fact, 35

what answerable for, 36

in manslaughter, 36, 172

trial of, 36

after the fact, 37

by receiving stolen goods, 38

wife as, 38

trial and punishment, 38

no accessories in treason nor in misdemeanor, 39

accessories, where tried, 355

ACCIDENT, an exemption from criminal responsibility, 28

ACCIDENTAL HOMICIDE, 160

ACCOMPLICE, 35, n.

turning Queen's evidence, 374

evidence of, 412

ACCOUNTANT-GENERAL: *v.* PAYMASTER-GENERAL.

ACCOUNTS, falsification of, 237, 265

ACCUISING OF CRIME: *v.* THREATENING.

ACQUITTAL,

how proved, 437

consequences of verdict of, 444

ACTS OF PARLIAMENT: *v.* STATUTES.

ACTUAL BODILY HARM, 190

ADHERING TO THE SOVEREIGN'S ENEMIES, 50

ADJOURNMENT,

of trial, 450

in summary proceedings, 492: *v.* REMAND.

ADJUDICATION OF BANKRUPTCY, how proved, 438

ADMINISTERING,

chloroform, &c., 192

poison, &c., 193

voluntary oaths, 86

ADMINISTRATION OF JUSTICE, LIBELS ON: *v.* SEDITION.

ADMINISTRATION OF GOODS OF FELON, 466

ADMIRALTY,

robbery within the jurisdiction of, is piracy, 43

criminal jurisdiction of Court of, 305

offences committed within jurisdiction of, where tried, 356

ADULT, defined by Summary Jurisdiction Act, 482

ADULTERATION OF FOOD OR DRUGS, 143

ADVERTISING REWARD FOR RETURN OF STOLEN PROPERTY, 99

AFFIDAVIT, administering voluntary, 86

AFFIRMATION,

false, 82

of those objecting to oath, 408: *v.* OATH.

AFFRAY, 109

aggravations, 109

suppression and punishment, 109

AGGRAVATED: *v.* COMPOUND LARCENY

AGE OF DISCRETION, 26

AGENT,

embezzlement by, 237

trafficking in property intrusted to his care, 238

charging property so intrusted, 238

- AGREEMENT TO WITHDRAW FROM PROSECUTION, 450
- AIDER BY VERDICT, 339
- AIDERS AND ABETTORS, 35, n.
- AIDING PRISONER TO ESCAPE, 78
- ALARM THE QUEEN, attempt to, 54
- ALIENS : *v.* FOREIGNERS.
- ALLEGIANCE, seducing soldier from, 61
- ALPACA,
 - larceny of, &c., 221
 - injuring machines or manufactures, 279
- ALTERING, in forgery, 267
- AMBASSADORS, how far amenable to the criminal law, 32
- AMENDMENT OF DEFECTS, 340
- ANIMALS,
 - larceny of, 204
 - killing in order to steal carcass, skin, &c., 207
 - killing, maiming, wounding, &c., 283
- ANIMUS FURANDI,
 - possession of goods obtained with, 210
 - what it is, 216
 - must exist at time of taking, 216
- APOSTACY, 72
- APPEAL,
 - none ordinarily in criminal cases, 467
 - under the Supreme Court of Judicature Act, 470
 - from summary conviction to quarter sessions, 311
 - to superior court on case, 498
- APPEAL, TRIAL BY, 384
- APPREHENSION OF OFFENDERS, rewards for, 325 : *v.* ARREST.
- APPRENTICES, assaults on, 196
- AQUEDUCTS, destroying, 281
- ARMED : *v.* BUILDING ; SMUGGLING.
- ARMY,
 - desertion, 61
 - mutiny in, 61
 - offences in, 63
- ARMY DISCIPLINE AND REGULATION ACT, 1879, 61, 63
- ARRAIGNMENT, 370
 - standing mute at, 371
 - insanity at, 372
- ARRAY, challenge to the, 389

ARREST,

- obstructing lawful, 80
- of debtors, 124
- of clergymen engaged in their duty, 196
- defined, 317
- with warrant (*q. v.*), 317
- without warrant, 322
 - by constable, 322
 - by private person, 323
- on hue and cry, 325
- rewards for diligence in, 325
- privilege of witness from, 414

ARREST OF JUDGMENT, 447**ARSON,**

- definition of, 273
- proposed definition, 275, n.
- of churches, &c., 273
- of dwelling-houses, 273
- of shops, &c., 273
- of stations, &c., 273
- of public buildings, 274
- of things in, against, &c., buildings, 274
- of crops, 274
- of stacks, 274
- of mines, 275
- of ships, 275
- of ships of war, 276
- of ships in port of London, 276
- act must be done unlawfully and maliciously, 276
- what is a setting fire, 277
- the intent to defraud, 277

ART, destroying works of, &c., 285**ASPORTATION, must be proved in larceny, 215****ASSAULT,**

- both a crime and a civil injury, 3, 188
- common assault, 187
- wide scope of the crime, 187
- distinguished from battery, 188
- punishment or compensation, 188
- summary jurisdiction in, 189, 485
- judicial separation after, 189
- defences, 189

ASSAULT—continued.

- aggravated assault, 190
- actual bodily harm, 190
- wounding, 190
- grievous bodily harm, 190
- with intent to commit a felony, 192
- with intent to rob, 225
- to obstruct sale of grain, &c., 129
- in connection with wrecks, 195
- on revenue officers, 121
- on peace officers, 81, 195
- on clergymen, 196
- on gamekeepers, 149
- on apprentices, 196
- on servants, 196
- on lunatics, 196 : *v. INDECENT.*

*ASSEMBLY, unlawful, 106**ASSIZES, 301*

- when and where held, 301
- winter, 302
- commissions under which the judges sit at, 303
- commissioners at, 304
- judges regulated by Supreme Court of Judicature Acts, 304, n.
- special commission, 304

*ATHEISTS, formerly could not be witnesses, 408**ATTACHMENT, 105**ATTAINDER, 379**ATTAINDER, BILL OF, 295**ATTEMPT,*

- punishable, 16
- what is an, 16
- sometimes a felony, always at least a common law misdemeanor, 17
- verdict of, on indictment for completed offence, 17, 443
- punishment of, 17
- to injure or alarm the Queen, 54
- to murder, 175
- to procure miscarriage, 182
- to choke, &c., 192
- to steal, 216

*ATTENDANCE OF WITNESSES : v. WITNESS.**ATTORNEY : v. POWER OF ATTORNEY ; SOLICITOR.*

- AUTREFOIS ACQUIT,
 plea of, 378
 what acquittal must be proved, 378
AUTREFOIS ATTAINT, 379
AUTREFOIS CONVICT, 379

B.

BACKING A WARRANT, 320

BAIL,

- false personation of, 248
- what it consists in, 330
- in what cases may be allowed by magistrates, 330
- number and sufficiency of, 331
- refusing or delaying, 331
- excessive, 332
- bail after committal for trial, 332
- bail by the Queen's Bench Division, 332
- by justices at quarter sessions, 333
- by judges of assize, 333
- by coroners, 333

BAILEE,

- larceny by, 212
- goods stolen from bailee, ownership, how laid, 338

BANK : v. JOINT STOCK.

BANK BILL,

- larceny of, 203
- forgery of, 263
- offences relating to, 270

BANK OF ENGLAND, OR IRELAND,
 false dividend warrant, 263

BANK NOTES,

- larceny of, 203
- sometimes to be described as paper, 203
- forgery of, 263
- offences relating to, 270

BANK OF SEA OR RIVER, damaging, 281

BANKER,

- embezzlement by, 237
- trafficking in property intrusted for safe custody, 238

BANKRUPT,

- offences by, 122

- BANKRUPT—continued.**
 absconding, 123
 prosecution of, directed by the Court, 124
- BANKRUPTCY ACT,**
 false declarations under, 87
- BAPTISM : v. REGISTER.**
- BAR,**
 trial at, 301
 plea in, 377
- BARK, setting fire to, 274**
- BARN, setting fire to, 273**
- BARRATRY,**
 common, 96
 by solicitor, &c., 97
- BARRISTER : v. COUNSEL.**
- BATTERY, 188**
- BATTLE, trial by, 384**
- BAWDY-HOUSE : v. BROTHEL.**
- BEAST : v. ANIMAL.**
- BEATING, killing by, 173**
- BENCH WARRANT, 362**
- BEST EVIDENCE, 429**
- BETTING-HOUSE, 139**
- BESTIALITY : v. UNNATURAL CRIME.**
- BIGAMY, 135**
 when a second marriage is not felonious, 135
 defence and evidence, 136
 punishment, 136
- BILL OF ATTAINDER, 295**
- BILL OF PAINS AND PENALTIES, 295**
- BILL OF EXCHANGE, larceny of, 203**
- BILL OF INDICTMENT,**
 before the grand jury, 357
 found true, or thrown out, 358
 if thrown out, may be preferred again, 359
- BIRD,**
 larceny of, 204
 killing, maiming, &c., 283
- BIRTH : v. CONCEALMENT ; REGISTER.**

- BLACKENED FACE, with intent, &c., 255
BLACKLEAD, larceny of, 201
BLASPHEMY, 73
BLOOD, corruption of, abolished, 465
BOAT : *v.* VESSEL.
BODILY FEAR : *v.* FEAR.
BODILY HARM,
 doing actual, 190
 grievous, 191
BOILING WATER : *v.* CORROSIVE FLUID.
BOND,
 larceny of, 203
 forgery of, 264
BOROUGH SESSIONS, 313
 grant of, 313
BOUNDARY, crimes committed within five hundred yards of, where
 tried, 353
BOXING, death by, 173
BRASS : *v.* METAL.
BREACH OF PRISON, 78
 when a felony, when a misdemeanor, 79
BREACH OF TRUST : *v.* EMBEZZLEMENT.
BREAKING,
 in burglary, 252
 actual, 253
 constructive, 253
 breaking out, 254
 breaking, but no entry, guilty of attempt, 254 : *v.* HOUSE-
 BREAKING.
BRIBERY, 87
 to influence the conduct of one in office, 88
 to procure a place or appointment, 88
 at elections, 89
 parliamentary, 89
 on part of candidate, 90
 on part of voter, 93
 municipal, 95
 treating, 91
 undue influence, 91
 personation, 92
 illegal practice, 92
 subsequent disqualification of candidates, 94
 time limited for prosecution, 345

- BRIDGE,**
 nuisance to, 141
 destroying, 281
- BROKER,**
 embezzlement by, 237
 trafficking in property intrusted to, 238
- BROTHEL,**
 keeping, 142
 lodging thieves therein, &c., 231
- BUILDING,**
 being found at night with intent to break into, 255
 being in, by night with intent, &c., 255
 setting fire to, 273
 setting fire to property in, against, &c., 274
 malicious injury to, by gunpowder, &c., 278
 demolishing, 279
 tenant demolishing, 279
- BULL : v. CATTLE.**
- BUOY, interfering with, 281**
- BURDEN OF PROOF, 424**
- BURGLARY, 250**
 defined at common law, 250
 under the Larceny Act, 250
 the time, 250
 the place, 251
 what is a dwelling-house, 251
 the residence necessary, 251
 the manner, 252
 the breaking (*q. v.*), 252
 the entry, 254
 breaking out, 254
 breaking, but no entry, an attempt, 254
 the intent, 254
 punishment, 255
 burglary distinguished from housebreaking, 256, 259
- BURNING : v. ARSON.**
- BUYING counterfeit coin at lower value, 67**

C.

- CAMBRIDGE UNIVERSITY COURTS, 314**
- CAMPBELL'S ACT, 112, 117**
- CANAL,**
 setting fire to building belonging to, 273

CANAL—continued.

destroying works, 281

CAPIAS AD RESPONDENDUM, 363

CAPITAL PUNISHMENT, 458

execution, 477

CARDS : *v.* GAMING.

CARNAL KNOWLEDGE,

of girls, under age of twelve, 181

under age of thirteen, 181

by false representations, &c., procuring female under age of
twenty-one to have, 181

CARRIAGE : *v.* JOURNEY.

CARRIER : *v.* BAILEE.

CARRYING AWAY, must be proved in larceny, 215

CASE

before magistrates stated to superior court, 498

on point of law, 498

CATTLE,

stealing, 207

killing, maiming, &c., 283

CENTRAL CRIMINAL COURT, 306

jurisdiction, 306

when held, 306

commissioners or judges, 307

trial of murder or manslaughter under the Mutiny Act, 307

transferred jurisdiction, 307, 368

sessions not interfered with, 308

regarded as one county, 356

CERTIFICATE,

forgery of, 263, 264

certificate of dismissal by magistrate, 482, 493

CERTIORARI,

removal of indictment from inferior courts to Queen's
Bench Division, 300, 366

under what circumstances, 300, 366

removal to Central Criminal Court, 307

when the writ should be applied for, 366

how obtained, 367

removal of proceedings before magistrates, 499

CHALLENGE OF JURORS, 388

form of, 388

for cause, 388

to the array, principal, or for favour, 389

CHALLENGE OF JURORS—continued.

- how made and tried, 389
- to the polls, principal or for favour, 390
- how made and tried, 390
- jurors ordered by the Crown to stand by, 391
- peremptory challenge, 391
- number allowed, 392
- reasons assigned for allowing, 392, n.

CHALLENGE TO FIGHT, 110

CHANCE MEDLEY, 159

CHANCELLOR, slaying the, 51

CHAPEL: v. CHURCH.

CHARACTER OF PRISONER,

- evidence of good, 428
- of bad, 426, 428
- effect of evidence as to, 428

CHARACTER OF WITNESS, 411

- what questions may be asked, 411
- proof of former conviction, 411

CHARGE TO THE GRAND JURY, 357

CHATTELS: v. GOODS.

CHAUD MEDLEY, 159

CHEATING,

- at common law, 248
- statutes punishing particular deceits, 249
- punishment, 249

CHEQUE,

- larceny of, 203
- obliterating or altering crossing on, 263

CHILD, stealing, abandoning, exposing, 185

- defined by Summary Jurisdiction Act, 482

CHLOROFORM, administering, &c., 192

CHOKE, attempting to, with intent, &c., 192

CHOSES IN ACTION, larceny of, 202

CHRISTIANITY, a part of the law of England, 73

CHURCH, CHAPEL, &c.,

- at common law might be the subject of burglary, 252
- sacrilege, 256
- setting fire to, 273: v. PUBLIC WORSHIP.

CIRCUITS, 302

- CIRCUMSTANTIAL EVIDENCE, 433
distinguished from direct, 433
conclusive or presumptive, 434
- CIVIL OR CRIMINAL, test whether proceeding is, 4
- CIVIL INJURIES
contrasted with crimes, 2
course to be taken when the act is also a crime, 3
false distinctions pointed out, 3
narrow line separating from crime, 3
- CLAIM OF RIGHT : *v.* RIGHT.
- CLERGYMAN,
assault on, 196
arrest of, 196
- CLERK OF THE MARKET, court of, 315, n.
- CLERKS,
larceny by, 219
embezzlement, 233
proof of employment as, 234
- CLIPPING COIN, 66
- COACH, offences committed on, where tried, 354
- COACH-HOUSE, setting fire to, 273
- COAL,
larceny of, 201
setting fire to, 275
- CODICIL : *v.* WILL.
- CODIFICATION OF THE CRIMINAL LAW, 515
definition of the term, 515
history of attempts, 515
analysis of proposed code of 1880, 520
- COIN,
offences relating to the, 64
certain offences formerly treason, 48, 64
some offences might be dealt with as false pretences, 65
counterfeiting, 65
colouring, washing, &c., 66
impairing, 66
defacing, 66
buying or selling counterfeit at lower value, 66
importing and exporting, 67
uttering, 68
after previous conviction, 451

COIN—continued.

- having in possession, &c., 68
- making, &c., coining tools, 69
- conveying out of Mint instruments, bullion, &c., 69
- testing suspected coin, 69
- search for, and seizure of counterfeit coin and tools, 69
- expenses of witnesses, 415

COLOURING, &c., COIN, 66

COMBINATIONS : *v.* CONSPIRACY ; TRADE.

COMMENCEMENT OF INDICTMENT, 337

COMMISSIONS,

- at assizes, 303
- special, 304
- at Central Criminal Court, 306

COMMISSIONERS AT ASSIZES, 304

COMMITTAL

- for trial, 329
- forms of committal, 329

COMMON ASSAULT : *v.* ASSAULT.COMMON BARRATRY : *v.* BARRATRY.

COMMON LAW, crimes at, 5

COMMON INFORMER, 100

COMMON NUISANCE : *v.* NUISANCE.

COMPANIES,

- public, embezzlement by directors, &c., 239
- receiving property and not entering in books, 240
- falsifying books, 240
- making false statements, &c., 240
- falsifying books of company wound up, 241

COMPANIES ACT, 1862, 241

COMPASSING

- death of sovereign, queen, or eldest son and heir, 49
- death, destruction, harm, &c., of sovereign, 52 : *v.* FELONIOUS COMPASSING.

COMPENSATION BY PRISONER, 466

COMPETENCY OF WITNESSES : *v.* WITNESS.

COMPOUND LARCENY,

- distinguished from simple, 198
- cases of, 219

COMPOUNDING FELONY, 98

- theft bote, 99

COMPOUNDING FELONY—*continued.*

reward for return of stolen property, 99

advertising reward, &c., 99

COMPOUNDING MISDEMEANOR, 100.

COMPOUNDING INFORMATION ON PENAL STATUTE, 100

COMPULSION, as an exemption from criminal responsibility, 29

CONCEALMENT

of birth, 183

verdict of, on indictment for murder, 183

CONCEALMENT BY BANKRUPT: *v.* BANKRUPT.

CONCEALMENT OF DOCUMENTS, WILLS, &c., 203

CONCEALMENT OF TREASON: *v.* MISPRISION.

CONCEALMENT OF TREASURE TROVE, 70

CONCLUSION OF INDICTMENT, 341

CONFESSION

on arraignment, 373

before magistrate is merely evidence, 373

when admitted in evidence, 426

against whom, 432

before magistrate, 432

CONFINEMENT: *v.* SOLITARY CONFINEMENT.

CONSPIRACY, 130

the combination the gist of, 130

wide nature of crime, 131

objects enumerated, 131

not every combination to effect a tort is criminal, 133

punishment, 133

merged in felony, if carried out, 133

CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875, 127

CONSTABLE: *v.* OFFICER.

CONSTRUCTIVE TAKING, 209

CONTEMPTS OR HIGH MISDEMEANORS AGAINST THE SOVEREIGN AND GOVERNMENT, 70

CONTEMPT OF COURT, 103

direct, 103

consequential, 103

by whom committed, 103

proceedings, 105

CONTRACT OF SERVICE,

wilfully breaking, so as to deprive of gas or water, 128

so as to endanger life, 128

CONTRIBUTORY NEGLIGENCE, not recognized in manslaughter, 65

CONVEYANCES, fraudulent, 249

CONVICTION,

forgeries of, 264

how proved, 437

verdict entailing, 445

CO-PARTNERSHIP, larceny by members of, 214

COPIES, when allowed in evidence, 429, 436

COPPER: *v.* METAL.

CORN,

servants taking master's, &c., 217

setting fire to crops or stacks, 274

CORONER,

court of, 313

arrest by, 322

bail by, 333

inquisition of, 348

proceedings before, 349

committal for trial by, 350

CORPORATE BODIES: *v.* COMPANIES.

CORPORATIONS

may be guilty of crime, 31

larceny of property of, by members, 214, *n.*

CORRECTION, killing by, 173

CORROSIVE FLUID, throwing at any person, &c., 193

CORRUPT PRACTICES PREVENTION ACT, 1854, 89

CORRUPT AND ILLEGAL PRACTICE PREVENTION ACT, 1883, 89

CORRUPTION: *v.* BLOOD; BRIBERY.

COSTS,

in certain cases of libel, paid by prisoner, 118

on acquittal of offence under Vexatious Indictments Act,

prosecutor may be ordered to pay, 360, 416

on *certiorari*, 368

when paid by prisoner, 416, 466

on summary proceedings, 496: *v.* EXPENSES.

COTTON,

larceny of, in process of manufacture, 220

injury to manufactures or machines, 279

COUNSEL,

order of speeches and examination, 396

when incompetent to give evidence against client, 407

functions of counsel for prosecution, 418

for defence, 418

requested by judge to defend prisoner, 449

COUNTERFEITING COIN, 65 : *v.* COIN.

COUNTERFEITING TRADE-MARKS, 125

COUNTS,

for distinct acts of stealing, 218

when more than one count may be inserted, 341

more than one offence in same count, 342

charging different offences in different counts, 342

in treason, 342

in felony, 342

felony and misdemeanor, 343

in misdemeanor, 344

count charging previous conviction, 344

COUNTY QUARTER SESSIONS : *v.* QUARTER SESSIONS.

COUNTY PROPERTY, how described in indictment, 338

COURT, CONTEMPT OF : *v.* CONTEMPT.

COURT OF A CRIMINAL JURISDICTION, 295

COURT LEET, 315, *n.*

COURT MARTIAL, 61, 63

COURT ROLL, forgery of, 264

COW,

stealing, 207

killing, maiming, &c., 283

CREDIBILITY OF WITNESSES, 409 : *v.* WITNESS.

CREDIT,

bankrupt fraudulently obtaining, 123

any person, 124

CREDITORS,

defrauding of, 122, 124

false claims by, 124

CRIME,

description thereof, 1

contrasted with civil injury, 2

proof that an act does not become a crime on account of
its intrinsic qualities, 2

courses open when an act is both a crime and a civil injury, 3

false distinctions from civil injury pointed out, 3

narrow line between the two, 3

morality and crime, 5

crimes at common law, 5

by statute, 5

crime contrasted with offence, 7

what are indictable crimes, 7

CRIME—continued.

completed crime punished more severely than attempt, 17,
153; *v.* PREVENTION OF CRIME.

CRIMINAL OR CIVIL, test whether a proceeding is, 4

CRIMINAL CODE: *v.* CODIFICATION.

CRIMINAL INTENTION: *v.* INTENTION.

CRIMINAL RESPONSIBILITY: *v.* RESPONSIBILITY.

CROPS, setting fire to, 274

CROSS-EXAMINATION, 422: *v.* EXAMINATION.

CROSSED CHEQUE: *v.* CHEQUE.

CROWN CASES RESERVED,

court for, 471

proceedings in, 471

CRUELTY TO ANIMALS, 283

CULTIVATED VEGETABLE PRODUCE: *v.* PLANTS.

CUSTOMS, offences relating to, 120

CUSTOMS, false declarations as to, 87

CUSTOMS CONSOLIDATION ACT, 1853, 120

CUSTOMS, general or particular, how proved, 436

CUTTING: *v.* WOUNDING.

D.

DAM,

damaging, 281

of pond, destroying, 282

DAMAGING: *v.* MALICIOUS INJURY.

DEAD ANIMALS, subjects of larceny, 204

DEAF AND DUMB PERSONS, by presumption of law are idiots, 21

DEATH, REGISTER OF: *v.* REGISTER.

DEATH, PUNISHMENT OF, 458: *v.* EXECUTION.

DEBENTURES,

larceny of, 203

forgery of, 263

DEBTORS,

offences by, 122

arrest of, 124

DEBTORS ACT, 1869, 122

DECEASED,

ownership of goods of, how laid, 338

depositions of deceased witnesses, 431

DECLARATIONS, FALSE: *v.* FALSE DECLARATIONS.

DECLARATION OF TITLE ACT, 1862, 265, 272

DECLARATION : *v.* AFFIRMATION.

DEED,

stealing, destroying, obliterating, &c., 203
forging, 264
how proved, 439

DEER,

hunting, killing, &c., 150, 205
having in possession skin, &c., of, 205

DEFACING COIN, 66

DEFECTS

in indictment, 339
amendment of, 340
formerly demurrer in abatement to formal, 383

DEFENCE

in forma pauperis, 449
by counsel at request of judge, 449

DEFENDANTS, joinder of two or more, 345

DEFILEMENT : *v.* CARNAL KNOWLEDGE.

DELIVERY : *v.* LARCENY.

DEMANDING MONEY, by forged instrument, 271 : *v.* THREATS.

DE MEDIETATE LINGUÆ, JURY,

at University Courts, 314
formerly on trial of alien, 394

DEMENTIA,

naturalis, or *a nativitate*, 21
accidentalis or *adventitia*, 21
affectata, 25

DEMURRER,

not strictly a plea, 375
definition of, 382
form of, 382
judgment on, 382
reason why it seldom occurs in practice, 383
demurrer in abatement, 383

DEPOSE SOVEREIGN, COMPASSING TO : *v.* FELONIOUS COMPASSING.

DEPOSITIONS

taken before magistrates, 327
accused may have copies, 333
deposition of deceased or ill persons read at trial, 431
of person whose death is apprehended, 438

- DERIVATIVE EVIDENCE : *v.* HEARSAY.
- DESERTION, 61, 63
 inciting thereto, 61
- DESTROYING : *v.* MACHINERY ; MINES ; SHIPS ; TREES ; WILLS, &c. :
 v. MALICIOUS INJURY.
- DETAINER, forcible, 119
- DILATORY PLEAS, 375
- DIRECTOR OF PUBLIC PROSECUTIONS, 350
- DIRECTORS : *v.* COMPANIES.
- DISABLE, wounding, &c., with intent to, 191
- DISCHARGE BY MAGISTRATE, 329
- DISCHARGE OF JURY ON NON-AGREEMENT, 442
- DISFIGURE, wounding, &c., with intent to, 191
- DISORDERLY HOUSE, 142
- DISTRESS AFTER ORDER OF COURT OF SUMMARY JURISDICTION, 479
- DISTRINGAS, 363
- DISTURBING PUBLIC WORSHIP, 74
- DIVIDEND WARRANT, false, 263
- DOCK,
 stealing from, 221
 setting fire to dock buildings, 273
 destroying works, 281
- DOCUMENT, stealing, obliterating, &c., 203
- DOG,
 stealing, 206
 killing, maiming, &c., 283
- DOLI INCAPAX, infant when presumed to be, 26
- DOMITE NATURE, ANIMALS, larceny of, 205
- DREDGING : *v.* OYSTERS.
- DRILLING,
 illegal, 62
 time limited for prosecution, 345
- DRIVING, wanton and furious, 144
- DROWN : *v.* ATTEMPT TO MURDER.
- DRUGS,
 adulteration of, 143
 administering stupefying, &c., drugs, with intent, &c., 193
- DRUNKENNESS,
 no excuse for crime, 25

DRUNKENNESS—continued.

- when it is to be considered, 25
- involuntary, 26
- a disease, 26
- punishable on summary conviction, 146, n.

DUEL, killing in a, 173

DUMB: v. DEAF.

DUPPLICITY, count bad for, 342

DURESS PER MINAS, 29

DWELLING-HOUSE,

- what is a, under the Larceny Act, 251
- part let off, 252
- entering at night with intent to commit felony, 255
- being found in, by night, armed, &c., 255
- being found in, by night, with intent to commit felony, 255
- housebreaking (*q. v.*), 256
- stealing in dwelling-house to amount of £5, 257
 - with menaces, 257
- the goods must be under the protection of the house, 257
- setting fire to dwelling-house, 273
- damage, &c., by explosion, 278
- demolishing, 279
- tenant demolishing, 279

DYING DECLARATION, when received in evidence, 438

E.

EAST INDIA BONDS, forging, 263

EFFIGY, hanging in, 118

ELECTION: v. MUNICIPAL, PARLIAMENTARY.

ELECTION, forging documents relating to, 264

ELECTION, if too many acts are alleged in indictment for larceny, 218

ELEMENTS OF A CRIME, 12

ELISORS, 389

EMBEZZLEMENT,

- definition of, 233
- distinguished from larceny by clerks or servants, 233, 258
- the employment as clerk or servant, 234
- the receipt for, &c., the master, 235
- the unlawful appropriation, 235

EMBEZZLEMENT—continued.

- three distinct acts within six months may be charged, 236, 342
- verdict of larceny on indictment for embezzlement, and *vice versa*, 218, 236
- punishment, 237
- summary jurisdiction, 237, 483, 484
- embezzlement by public officers, 234
- by bankers, merchants, brokers, solicitors, agents, factors (*q. v.*), 237
- by trustees, 239
- by directors, officers, and members of public companies (*q. v.*) and corporate bodies, 239 : *v. BANKRUPT* ; *POST OFFICE*.

EMBRACERY, 95**ENDANGERING** safety of railway passengers, 194**ENEMIES**, adhering to the Sovereign's, 50**ENGLAND, BANK OF :** *v. BANK OF ENGLAND*.**ENLISTMENT :** *v. FOREIGN ENLISTMENT ACT*.**ENTERING**, in burglary, 256 : *v. DWELLING-HOUSE*.**ENTRY**, forcible, 119**ERROR,**

writ of, 468

jurisdiction in error under Supreme Court of Judicature Acts, 470

ESCAPE, 77

distinguished from breach of prison and rescue, 77

allowed by officers, 77

by private individuals, 78

aiding to, 78 : *v. PENAL SERVITUDE*.**ESSENTIALS OF A CRIME, 12****ESTREAT :** *v. RECOGNIZANCES*.**EVIDENCE,**

definition of, 424

burden of proof on prosecution, 424

what must be proved, 425

what may not be given in evidence, 426

evidence as to other offences, 426

when allowed, 427

evidence of good character, 428

of bad character, 428

effect of evidence of character, 428

best evidence must be given, 429

EVIDENCE—continued.

- as to written documents, 429
- hearsay no evidence, 430
 - why rejected, 430
 - when it may be given, 430
- deposition of those ill or deceased given in evidence, 431
- confessions, 431
- confession before magistrates, 432
- circumstantial or presumptive evidence distinguished from direct, 433
- circumstantial evidence, conclusive or presumptive, 434
- presumptions classified, 435
- written evidence, 436
- records, 436
- Acts of Parliament, 436
- other records, 436
- previous conviction, how proved, 437
- matters *quasi* of record, 437
- perpetuating the testimony of witness whose death is apprehended, 438
- written documents of private nature, as deeds, 438
- handwriting, how proved, 439
- points in which rules of evidence in civil and criminal cases differ, 440

EXAMINATION

- of witnesses, by grand jury, 358
- order of examination by counsel, 396, 417
- what witnesses must be called, 417
- ordering witnesses out of court, 418
- functions of counsel for prosecution, 418
 - for defence, 418
- rules founded on principle that witness is favourable to party calling him, 419
- examination-in-chief, 419
- questions must be relevant, 419
- leading questions not allowed, 419
 - exceptions, 420
- witness must testify from own knowledge, 421
- evidence of experts, 421
- contents of written documents, how proved, 421
- witness proving hostile, 421
- cross-examination, 422
- re-examination, 423

EXAMINATION—continued.

- questions put through judge, 423
- objections to questions, how made, 423: *v.* EVIDENCE.

EXCHEQUER BILLS, BONDS, AND DEBENTURES.

- forging, 263
- offences relating to, 269

EXCISE, false declarations as to, 87**EXCUSABLE HOMICIDE, 158**

- distinguished from justifiable homicide, 158
- homicide in self-defence, 159
- by misadventure, 160
- in fighting, 173
- by correction, 173
- whilst doing another act, 173

EXECUTION OF CRIMINAL, 477: *v.* JUSTIFIABLE HOMICIDE.**EXECUTION OF DEED, how proved, 439****EXEMPTIONS from criminal responsibility, 19****EX-OFFICIO INFORMATION: *v.* INFORMATION.****EXPEDITION, ILLEGAL: *v.* FOREIGN ENLISTMENT ACT.****EXPENSES OF WITNESSES,**

- for prosecution, in felony, 415
- in misdemeanor, 415
- on summary conviction, 416
- of witnesses for defence, 416
- where prisoner pays expenses, 416: *v.* COSTS.

EXPERTS,

- evidence of, 421
- as to handwriting, 267

EXPLOSIVE SUBSTANCES: *v.* GUNPOWDER.

- recent legislation, 278

EXPORTING COUNTERFEIT COIN, 67**EXPOSING CHILDREN, 186****EXPRESS MALICE, 14**

- in murder, 167

EXTORTION, 101: *v.* THREATS.**EXTRANEOUS CIRCUMSTANCES often determine the degree of guilt, 153****F.****FABRICATION, what will constitute in forgery, 266****FACTI PRÆSUMPTIO, 435**

FACTOR,

- embezzlement by, 237
- charging property intrusted, 238

FALSE DECLARATIONS, 87

- under Land Transfer Act, 271
- under Declaration of Title Act, 272

FALSE IMPRISONMENT, 197**FALSE OATHS AND AFFIRMATIONS, 81: v. PERJURY.****FALSE PERSONATION: v. PERSONATION.****FALSE PRETENCES,**

- obtaining goods or money by means of, 242
- some coining offences might be dealt with as, 65
- hard to distinguish from larceny and from non-criminal lie, 211, 242, 258
- on indictment for larceny not acquittal because it turns out to be false pretences, 242, 245
- the pretence must be of an existing fact, 243
- what misrepresentation amounts to, 243
- exaggeration, 243
- breach of warranty, &c., 243
- false pretence need not be expressed in words, 244
- when defendant should be indicted for forgery, 244
- the intent to defraud, 245
- need not be to defraud a particular person, 245
- evidence of subsequent or prior obtaining, 245
- punishment, 245
- fraudulent winning at play punished as, 245
- inducing by fraud the execution of valuable securities, 246

FALSE SIGNALS: v. SIGNALS.**FALSE STATEMENTS as to public companies, circulating, &c., 240****FALSE WEIGHTS AND MEASURES: v. WEIGHTS AND MEASURES.****FALSIFICATION OF ACCOUNTS, 237, 265****FALSIFICATION OF BOOKS**

- of public company, 240
- of company wound up, 241

FARM, setting fire to, 273**FEAR OF EXCESSIVE AND UNLAWFUL HARM,**

- as an exemption from criminal responsibility, 29
- bodily fear, in robbery, 222

“FELONICK CEPIT ET ASPORTAVIT” to be used in indictment for larceny, 339

FELONIOUS COMPASSING to depose sovereign, levy war, procure foreign invasion, 55

"**FELONIOUSLY**" applied by statute to an act makes it a felony, 9

FELONY,

distinguished from misdemeanor, 8

origin of the term, 9

further points in which it differs from misdemeanor, 10

compounding, 98

misprision of, 101

general punishment for, by statute, 455

otherwise, 455

after previous conviction, 456

FEME COVERT : v. WIFE.

FERRE NATURE, ANIMALS, larceny of, 204

FICTITIOUS PLAINTIFF, suing in name of, 97

FIGHT, CHALLENGE TO, 110

FINDING, larceny of, 215

FINE,

punishment by, 460

how enforced, when imposed by magistrate, 493

FIRE : v. ARSON.

FISH,

taking or destroying, 206

destroying in pond, 282

FISHPOND, malicious injury to, 283

FIXTURES, larceny of, 201

FLOODGATE : v. DAM.

FOOD, adulteration of, 143

FORCE, in robbery, 223

FORCIBLE ABDUCTION, 184

FORCIBLE ENTRY AND DETAINER, 119

FORCING SEAMEN ON SHORE, 195

FOREIGN ENLISTMENT ACT, 59

illegal enlistment, 59

illegal shipbuilding, 60

illegal expeditions, 60

trial, where, 60

FOREIGNERS,

not exempt from criminal responsibility, 28, 32

formerly might demand trial by jury *de medietate lingue*, 394

FORFEITURE,

- abolition of, on conviction, 10, 465
- of office, on conviction for treason or felony, 465

FORGERY,

- definition of, 261
- connection with false pretences, 244, 261
- instruments dealt with in the Forgery Act enumerated
(*v.* various titles), 262
- other cases provided for by statutes, 264
- forgery at common law only a misdemeanor, 265
- nature of the instrument forged, 266
- the fabrication necessary, 266
- alteration, 267
- proof of handwriting, 267
- the intent to defraud, 268
- no person need be defrauded, 268
- the uttering, 268
 - when a tender will suffice, 268
- kindred offences relating to Exchequer bills, &c., 269
 - to bank-notes, 270
- demanding, &c., by means of forged instrument, 271

FORMA PAUPERIS : *v.* PAUPERIS.

FORMAL DEFECTS : *v.* DEFECTS.

FORMER CONVICTION : PREVIOUS CONVICTION.

FOUND, larceny of things, 215

FOX'S ACT, 116

FRAME : *v.* MACHINERY.

FRANK-PLEDGE, view of, 315, n.

FRAUDULENT BANKRUPTCY : *v.* BANKRUPT.

FRAUDULENT CONVEYANCES, 249

FRUIT,

- larceny of, 202
- destroying, 284

FUNDS, false entry, &c., in, 263

FURIOUS DRIVING, 144

FURZE, setting fire to, 274

G.**GAME,**

- offences relating to, 148
- ground of special legislation, 148
- taking or destroying game or rabbits by night, 148, 205

GAME—continued.

entering, &c., for purpose of taking, &c., 148
 punishment, 149
 apprehension of offenders, 149
 three or more armed by night for purpose, 149
 time limited for prosecution, 150, 345
 search for game, guns, &c., 150
 taking hares, &c., by night, 150
 summary convictions, 474: *v. DEER*; *SPRING GUN*.

GAMING, 137

winning by fraud, 137
 in public places, 138

GAMING-HOUSE, 138

steps taken by legislature to suppress, 138
 betting-house, 139
 evidence as to character of the house, 140

GAOL DELIVERY,

court of, 301
 commission of, 303

GAS, by wilful breaking contract of service, depriving of, 128**GATE, destroying, 282****GENERAL ISSUE,**

of not guilty, 380
 advantage of pleading this, 380
 what the prosecutor must prove, and what may be urged by
 the prisoner, 380
 form of, on record, 381

GENERAL QUARTER SESSIONS: v. QUARTER SESSIONS.**GIRL: v. ABDUCTION; CARNAL KNOWLEDGE.****GLASS: v. FIXTURES.****GOOD BEHAVIOUR,**

security for, 289, 291
 forfeiture of recognizances, 289, 302: *v. SECURITY*.

GOOD CHARACTER: v. CHARACTER.**GOODS,**

stolen, how disposed of by court, 451
 of felony, how administered, 466

GOVERNMENT,

offences against the sovereign and, 46
 various contempts and high misdemeanors against, 70

GRAIN, assaults with intent to obstruct sale of, &c., 129

GRAND JURY,

- cannot ignore bill on ground of insanity, 24
- disclosing evidence to prisoner, 96
- prosecution with or without previous finding by, 335
- how chosen, 357
- sworn and charged, 357
- examination of witnesses by, 358
- finding by, 358
- qualification at sessions, 385

GRAND DISTINGUISHED FROM PETTY LARCENY, 208**GRASS, setting fire to, 274****GREAT SEAL, forging, 262****GRIEVOUS BODILY HARM, 191****GUILTY, PLEA OF : v. CONFESSION.****GUILTY KNOWLEDGE,**

- in receiving stolen goods, 229
- in uttering forged instruments, 269
- evidence of other offences allowed in proof of, 427

GUNPOWDER,

- to harm, &c. any person by explosion of, 193
- to apply to any person with intent to burn, &c., 193
- placing in, &c., vessels with intent, &c., 193
- damaging houses by, 278
- vessels by, 280

H.**HABEAS CORPUS, removal of defendant to plead, 361****HABEAS CORPUS AD TESTIFICANDUM, 414****HABEAS CORPUS ACT,**

- copy of warrant of commitment to accused, 329
- early trial, 333

HABITUAL CRIMINALS,

- acts for which punishable, 294
- police supervision, 294

HAIR, injury to machine, or manufactures, 279**HANDWRITING,**

- proof of, in forgery, 267
- how proved, 426

HANGING IN EFFIGY, 118**HARBOUR : v. DOCK.****HARBOURING THIEVES, 231, 294**

HARD LABOUR.

punishment of, 460
two classes, 460

HARE : v. GAME.

HARM, fear of excessive and unlawful, an exemption from criminal responsibility, 29 : *v. BODILY HARM.*

HAY, setting fire to, 274

HEALTH, offences against public, 135

HEARING OF THE CASE, 395 : *v. TRIAL.*

HEARSAY,

no evidence, 430
reason for rule, 430
when allowed, 430

HEATH, setting fire to, 274

HEIRESS, abduction of, 184

HEMP, larceny of, in process of manufacture, 220

HERESY, 75

HIGH COURT OF JUSTICE : v. SUPREME COURT OF JUDICATURE ACTS.

HIGH COURT OF PARLIAMENT, 295

HIGH SEAS,

offences against the law of nations committed on, 42
robbery on, or piracy, 42
offences committed on, where tried, 356

HIGH TREASON, 46, n. : *v. TREASON.*

HIGHWAYS, nuisances to, 141

HOMICIDE, 155

malice presumed, 155
justifiable (*q. v.*), 155
excusable (*q. v.*), 158
felonious, 161
suicide, 161
murder, 163
manslaughter, 169
whether murder, manslaughter, or non-felonious, distinguished in several cases, 173
classification according to the various states of mind, 176

HOPBINDS, destroying, 285

HORSE,

stealing, 207
killing, maiming, &c., 283

HOSTILITY OF WITNESS, 421

House, setting fire to, 273 : *v.* DWELLING-HOUSE.

HOUSEBREAKING,

distinguished from burglary, 256, 259

definition, 256

punishment, 256

on indictment for burglary, verdict of, 256

distinguished from larceny in dwelling-house, 257, 259

HOUSEBREAKING INSTRUMENT, being found at night with, 256

HUE AND CRY, arrest on, 325

HUSBAND,

cannot steal property of wife, 214

cannot be witness against wife, 405

except in certain cases, 405

I.

IDENTIFICATION OF OFFENDER, 293

IDIOT, exempt from criminal responsibility, 21

IDLE AND DISORDERLY PERSONS, 145

IGNORANCE,

sometimes amounts to malice, 14

as an excuse for crime, 28

of law never excuses, 28

of fact, when it excuses, 28

IGNORING THE BILL, 358

ILLEGAL : *v.* UNLAWFUL.

ILLEGAL TRAINING AND DRILLING, 62

ILLNESS

of juror, 393

of witness, 431

of prisoner, 450

IMAGINING : *v.* COMPASSING.

IMMORALITY, not punished, as such, by the criminal law, 4, 72

IMPAIRING COIN, 66

IMPEACHMENT, 296

who are liable to, 296

pardon not pleadable to, 296

proceedings and trial, 296

IMPEDING ESCAPE FROM WRECK, 195

IMPLIED MALICE, 14

in murder, 168

IMPORTING COUNTERFEIT COIN, 67

IMPOSTORS, religious, 74

IMPRISONMENT,

punishment of, 459

usual limits of, 459

pending trial, 329 : *v.* FALSE IMPRISONMENT.

INCITING

to commission of crime, 35

to desertion or mutiny, 61

INCOMPETENCY : *v.* WITNESS.

INCORRIGIBLE ROGUE, 146

INDECENT ASSAULT,

on females, 181

on males, 182

INDECENT CONDUCT, &c., 137 : *v.* OBSCENE.

INDIA BONDS, forgery of, 263

INDIA STOCK, personating owner of, 247, n.

INDICTABLE CRIMES, 7

INDICTMENT,

definition of, 336

when it lies, 336

form of, 336

example of, 337

the commencement, 337

the statement, 337

defendant's name, 337

ownership of property, 337

statement of time, 338

of place, 339

of facts, intent, &c., 339

technical words, when to be used, 339

defects in, 339

amendment of defects, 340

the conclusion, 341

insertion of more than one count, 341

charging more than one offence in the same count, 342

different offences in different counts, 342

in treason, 342

in felony, 342

felony and misdemeanor, 343

in misdemeanor, 344

INDICTMENT—*continued.*

- count for previous conviction, 344
- joinder of defendants, 345
- cases in which time is limited for preferring, 345
- how drawn up and indorsed, 346
- before the grand jury, 357
- finding of grand jury, 358
- consequences of being thrown out, 359
- Vexatious Indictments Act, 359

INDICTMENT BEFORE HOUSE OF PEERS, 297

INDIVIDUALS, offences against, 153

INDORSEMENT,

- fraudulently inducing, 246
- forging, 263

INDUSTRIAL SCHOOL, 464

INFANCY,

- when exempts from criminal responsibility, 26
- three ages to be considered, 26
- infancy of witness as a ground of incompetency, 407

INFORMATION,

- definition of criminal, 346
- other uses of the term, 346, n.
- information *ex officio*, 346
- example of, 347
- information by Master of the Crown Office, 348
- proceedings, 348
- how tried, 348
- process on, 364

INFORMATION IN SUMMARY PROCEEDINGS, 488

INFORMATION ON PENAL STATUTE, compounding, 100

INJURE, attempt to, the Queen, 54

INJURY TO PROPERTY, 273: *v.* MALICIOUS INJURY.

INLAND REVENUE STAMPS, forging, 264

INN, disorderly, 142

INNUENDO, in libel, 115

INQUISITION OF OFFICE, 336: *v.* CORONER.

INSANITY,

- an exemption from criminal responsibility, 20
- medical and legal views differ, 20
- varieties of, 21
- partial or total, 21

INSANITY—continued.

- permanent or temporary, 21
- three stages in the history of, 21
- the existing law as declared in *M'Naughten's Case*, 22
- how dealt with by the proposed Criminal Code, 23
- medical evidence, 23
- trial in cases of, 24
- is a bar at any stage to further proceedings, 25
- appearing at arraignment, 372
- reprieve, if after judgment, 473
- insanity of witness, a ground of incompetency, 406

INSURRECTION AGAINST THE SOVEREIGN, 50**INTENT**

- in larceny, 216
- in false pretences, 245
- in forgery, 268
- in malicious injuries, 277

INTENTION

- an essential of crime, 12
- what is it, 12
- contrasted with will, 12
- determines whether an act is criminal, 13, 15
 - though not the sole gauge of liability, 16
- naked intention not punishable, except in treason, 15
- criminal intention, or malice: *v. MALICE.*

INTERROGATION OF PRISONER, 404**INTIMIDATING PARTIES OR WITNESSES, 96****INVASION, procuring foreign, 55****INVITO DOMINO, in larceny, taking, 209****INVOLUNTARY,**

- meaning of the term, 12
- acts not punishable, 19

IRRESISTIBLE IMPULSE, 23**IRON: *v. METAL.*****ISSUE: *v. GENERAL ISSUE.*****J.****JERVIS'S ACTS, 488****JOINER OF COUNTS: *v. COUNTS.*****JOINDER OF DEFENDANTS, 345****JOINT OWNER, larceny, &c., by, 213**

JOINT STOCK BANKING COMPANY, goods of, ownership, how laid,
338

JOINT TENANT, larceny by, 213

JOURNEY, offences committed on, where tried, 354

JUDGES,

slaying the, 51

at assizes, 301

at the Central Criminal Court, 306

bail by, 333

JUDGMENT, 447

arrest of, 447

postponed, 447

where defendant is not before the court, 447

how given, 448

reversal of: *v.* REVERSAL.

JUDGMENT OF MAGISTRATE on summary conviction, 493

JUDICIAL SEPARATION AFTER ASSAULT, 18

JURIS PRÆSUMPTIO, 435

JURIS ET DE JURE PRÆSUMPTIO, 435

JURISDICTION, plea to the, 376

JURORS: *v.* JURY.

JURY,

contempt of court by, 104

trial by, 384: *v.* EMBROCERY; GRAND JURY; PETTY JURY.

when trial by jury may be claimed, 481

JURY OF MATRONS, 473

JUSTICE, PUBLIC: *v.* PUBLIC JUSTICE.

JUSTICE OF PEACE: *v.* MAGISTRATE.

JUSTIFIABLE HOMICIDE, 155

in execution of criminal, 155

by officer in execution of duty, 156, 174

in prevention of crime, 157

in cases of rape, &c., 157

distinguished from excusable homicide, 158

JUVENILE OFFENDERS, 482

K.

KEEPING THE PEACE,

security for, 288, 291

forfeiture of recognizances, 289, 291

recognizances, general or special, 291: *v.* SECURITY.

KILLING, animals, 283: *v.* HOMICIDE.

KNOWLEDGE: *v.* CARNAL KNOWLEDGE; GUILTY KNOWLEDGE.

L.

LABOUR : *v.* HARD LABOUR.

LAND : *v.* REAL PROPERTY.

LAND TRANSFER ACT, 1875.

 forgery against, 265

 offences against, 271

LARCENY,

 definition of, 198

 simple and compound distinguished, 198

 what things may be the subjects of, 199

 at common law, only personal goods, 200

 law as to things real, 200

 severance, &c., makes personal goods, 200

 materials of buildings, fixtures, &c., 201

 ore or coal from mines, 201

 trees, 201

 plants, &c., 202

 deeds, &c., 202

choses in action (including cheques, &c.), 202

 animals, 204

 deer, 205

 hares and rabbits, 205

 fish, 206

 oysters, 206

 dogs, 206

 horses, cows, sheep, &c., 207

 killing animals to steal carcass, skin, &c., 207

 the value of the thing stolen, 207

 grand and petty larceny, 208

 ownership of goods, how laid, 208

 the wilfully wrongful taking possession, 208

 if claim of right, no felony, 208, 216

 actual taking, 209

 constructive taking, 209

 where the right of property, as well as of possession, is
 parted with, 209

 authority of servant to part with property or possession, 210

 where the possession is obtained *animo furandi*, 210

 ring-dropping, 211

 narrow line separating larceny from false pretences, 211,
 242, 258

LARCENY—*continued*

- where the possession is obtained lawfully and *bona fide*
 - without any fraudulent intent in the first instance, 211
- in cases of bailment, 212
- where the delivery does not alter the possession in law, 212
- bare use does not divest of possession, 213
- the taking must be of another's goods, 213
- by joint tenant or tenant in common, 213
- by members of a corporation, 214, n.
- by husband and wife, 214
- larceny of things found, 215
- the taking physically regarded, 215
- asportation, 215
- attempt, 216
- animus furandi*, 216
- larceny distinguished from trespass, 216
- need not be *lucri causa*, 217
- servants taking master's corn, &c., 217
- counts for distinct acts of stealing, 218, 343
- verdict of embezzlement on indictment for larceny, and *vice versa*, 218, 236
- place of trial, 218, 353
- punishment, 219
 - after previous conviction, 456
 - in case of tenants or lodgers, 219
 - of clerks or servants, 219
- larceny distinguished from embezzlement, 233, 258
- compound* or aggravated larceny, 219
 - of goods in process of manufacture, 220
 - from vessels, docks, &c., 221
 - from wrecks, 221
 - by those in the public service, constables, &c.
 - stealing from the person, 225
 - in relation to post-office, 226: *v.* DWELLING-HOUSE; ROBBERY.
- verdict of larceny on indictment for embezzlement, and *vice versa*, 218, 236
- on indictment for false pretences not acquittal because it turns out to be larceny, 242
- count for receiving may be added, 230, 343
- summary jurisdiction in larceny, 484, 486
 - small larcenies and embezzlements, 484,
 - larcenies not indictable, 486

LAUDANUM, administering, &c., with intent, &c., 192

LAW OF CRIMES, 6
of Criminal Procedure, 6

LAW OF NATIONS, offences against, 42

LEAD : *v.* METAL.

LEADING QUESTIONS, rules as to, 419, 420 : *v.* EXAMINATION.

LETTER : *v.* THREATENING.

LEVYING WAR AGAINST THE SOVEREIGN, 50
direct or constructive, 50 : *v.* FELONIOUS COMPASSING.

LEWDNESS : *v.* INDECENCY.

LIBEL,

both a crime and a civil injury, 3
an offence against the public peace, 111
definition of, 111
civil and criminal proceedings, 112
when an indictment will lie, 113
when it will not, 114
truth of the libel, 112
privileged communications, 114
form of libel, 115
publication of, 115
proof of malice, 116
what must be proved, 116
the province of the jury, 116
Fox's Act, 116
who are criminally liable, 116
newspaper proprietors, &c., 117
punishment, 117
costs, 118, 416
blasphemous libel : *v.* BLASPHEMY. Seditious Libel : *v.* SEDITION.

LIBEL, threatening to publish, &c., in order to extort, 118

LICENCE OF MARRIAGE, forgery of, 264

LICENCE UNDER PENAL SERVITUDE ACTS,
regulations as to holders of, 293, 475
for what forfeited, 475
offences with regard to, 475
remission of part of sentence follows as a matter of course, 475

LIGHT : *v.* SIGNAL.

LIMITATION OF TIME FOR PROSECUTION : *v.* TIME.

LINEN,

- larceny of, in process of manufacture, 220
- injury to machines or manufactures, 279

LIQUIDATION : v. BANKRUPT.**LOCUS IN QUO, view of, by jury, 450****LOCK, destroying, 281****LODGERS, larceny by, 219****LODGING THIEVES, &c., 231****LOOM : v. MACHINERY.****LORD HIGH STEWARD,**

- court of, 299
- at Oxford or Cambridge, 314
- president on impeachment of peer for high treason, 297
- on indictment of peer, 298 : v. 313, n.

LORDS, HOUSE OF : v. PEERS.**LOST GOODS, larceny of, 215****LOTTERIES, 142****LUCRI CAUSA, in what sense taking in larceny must be, 217****LUNATICS, 21**

- assault on, 196 : v. INSANITY.

M.**MACHINERY,**

- demolishing, 279
- damaging, if used in certain manufactures, 279
- used in others, or in agriculture, 279

MADNESS, 21 : v. INSANITY.**MAGISTRATE,**

- slandorous words uttered to, 57
- false declarations before, 87
- contempt of court by, 103
- issue of warrant by, 318
- summons, 318
- information to, 319
- arrest by, 322
- proceedings before, 327
- examination, 327
- depositions, 327
- binding over witness, 328

MAGISTRATE—continued.

- remand, 328
- discharge or committal, 329
- bail, 330
- the sureties, 331
- refusing or delaying bail, 331
- excessive bail, 332
- proceedings against, 499 : *v.* SUMMARY CONVICTION.

MAIL, offences with regard to, tried in any county through which it passed, 353 : *v.* POST OFFICE.

MAIM,

- wounding, &c., with intent to, 191
- animals, 283

MAINTENANCE, 97

- what acts do not amount to, on account of relationship, 97
- curialis, ruralis*, 97, *n.* : *v.* CHAMPERTY.

MALA IN SE AND MALA QUIA PROHIBITA, 5

- as a test of the responsibility of ambassadors, 32
- the distinction noticeable in offences against public trade, 120

MALICE,

- equals, in legal signification, criminal intention, 13
- when it must be directly proved, 13
- when presumed, 14
- active or positive, passive or negative, 14
- express or implied, 14, 167
- danger of entertaining the moral signification, 15
- absence of, exempts from criminal responsibility, 19
- presumed in homicide, 155
- aforethought (*prepenſe*), or murder malice, 166

MALICIOUS INJURY : *v.* ARSON.

- to houses by explosion, 278
 - by demolishing, 279
 - in the case of tenants, 279
- to manufactures and machinery, 279
- mines, 280
- vessels, 280
- wrecks, 281
- sea and river banks, 281
- bridges, viaducts, and aqueducts, 281
- turnpikes, 281
- walls, gates, &c., 282
- railway trains and telegraphs, 282
- ponds and fish, 282

MALICIOUS INJURY—*continued.*

- animals, 283
- trees, 284
- plants, 284
- hopbinds, 285
- works of art, 285
- general provision, if damage exceeds £5, 285
 - if it does not exceed £5, 285, 487
- making a dangerous or noxious thing with intent, &c., 286
- not necessary to prove malice against the owner of the property, 286
- no defence that the offender was in possession, 286
- general intent to defraud will suffice, 286
- summary jurisdiction, 487

MANAGER : v. COMPANIES.**MANGANESE**, larceny of, 201**MANSLAUGHTER**, 169

- moral character varies widely, 169
- voluntary, 169
- the instrument used, 170
- distinguished from homicide *æ defendendo*, 160, 170
- involuntary, 170
- negligence, 171
- accessories before the fact, 36, 172
- punishment, 172
- by fighting, 173
- by correction, 173
- while doing an unlawful act, 173
 - a dangerous act, 174
- of officers of justice, 174
- by officers, 174
- states of mind constituting manslaughter, 176

MAN-TRAP, setting, 150**MANUFACTURES**,

- offensive or dangerous, are nuisances, 141
- larceny of goods in process of, 220
- malicious injury to, 279

MARINES ; v. ARMY.**MARRIAGE**,

- offences connected with, 135, 136, n.
- forging licence or certificate, 264 : *v.* REGISTER.

MARRIED WOMAN : v. WIFE.**MASTER**, still in possession, though goods intrusted to servant, 212

MATERIALITY : v. PERJURY.

MATRONS, jury of, 473

MAYHEM, 191

MEDICAL EVIDENCE ON INSANITY, 23

MEETING-HOUSE : v. CHAPEL.

MENACES : v. THREATS.

MERCHANDISE MARKS ACT, 1862..125

MERCHANT,

embezzlement by, 237

trafficking in property intrusted, 238

MESSAGE : v. TELEGRAPH.

METAL, &c.,

belonging to house, larceny of, 201

purchasing less than specified quantities of old, 294

**MIDDLESEX, offences committed in, may be tried in Q. B. Division,
but usually at sessions or C. C. C., 300, 306**

MIDDLESEX SESSIONS, 312

MILL, setting fire to, 273

MINE,

larceny from, 201

setting fire to, 275

malicious injury to, by conveying water, &c., 280

obstructing ways, 280

obstructing engines, &c., 280

MINIMUM PUNISHMENTS, abolished, 455

MISADVENTURE, homicide by, 160

MISCARRIAGE, attempts to procure, 182

MISDEMEANOR,

distinguished from felony, 8

meaning of the term, 10

further points in which it differs from felony, 10

compounding, 100

verdict for, though facts shew felony, 443

general punishment for, 456

MISFORTUNE, OR MISHAP, as an exemption from criminal responsibility, 28

MISJOINDER OF COUNTS : v. COUNTS.

MISNOMER : v. NAME.

MISPRISION,

meaning of, 8

MISPRISION—continued.

- negative or positive, 8
- of treason, 54
- of felony, 101

MITIGATE PUNISHMENT, power of Court of Summary Jurisdiction to, 479

MOCK AUCTION, larceny by means of, 211

MOHAIR,

- larceny of, in process of manufacture, 221
- injury to manufactures or machinery, 279

MONEY : v. FALSE PRETENCES.

MORAL NATURE of an act does not determine whether it is criminal, 4, 72, 135

MORALS, offences against public, 135

MORAVIAN : v. QUAKER.

MOTIVE,

- may explain the intention, but does not determine the quality of an act, 13
- absence of, does not prove insanity, 23

MOULDS, making, &c., for producing bank-notes, &c., 271

MUNICIPAL ELECTION,

- false declarations as to, 87
- bribery, &c., at, 95

MURDER, 163

- varies in moral character, 163
- definition, 164
- the offender must be of sound memory and discretion, 164
- the unlawful killing, 164
- form of death, 164
- cause of death, 165
- time of death, 165
- variance as to the form of death, 165
- finding the body, 166
- the offender must be a reasonable creature, in being, and under the king's peace, 166
- the malice aforethought, 166
- express and implied malice, 167
- punishment, 168
- accessories after the fact, 168
- on indictment for murder the jury may convict of certain other offences, 168, 444
- murder in fighting, 173

MURDER—continued.

- in correction, 173
- whilst doing another act, 173
 - a dangerous act, 174
- of officers of justice, 174
- by officers, 174
- states of mind constituting murder, 176
- attempt to murder, 175

“MURDRAVIT” to be used in indictment for murder, 339

MUTE,

- advising prisoner to stand, 96
- prisoner standing, 371

MUTINY, inciting to, 61

N.

NAME of prisoner in indictment, 337

NATIONAL CHURCH, offences against, 75

NATIONS, offences against the law of, 42

NAVAL DISCIPLINE ACT, 62, 64

NAVIGABLE : *v.* RIVER.

NAVY,

- desertion and mutiny, 62
- offences in, 64

NEGLECT TO PROVIDE, &c.,

- for apprentices or servants, 196
- lunatics, 196

NEGLIGENCE,

- sometimes amounts to malice, 14
- causing manslaughter, 171

NEW TRIAL, 467

- when granted, 467
- by what courts, 468
- how obtained, 468

NEWSPAPERS AND LIBEL, 117

NIGHT, under the Larceny Act, 250

NISI PRIUS, commission of, 304

NOMINIS PRÆSUMPTIO, 435

NONCONFORMITY, 75

NON COMPOS MENTIS : *v.* INSANITY.

NOT GUILTY : *v.* GENERAL ISSUE.

NOTE: *v.* BANK.

NOXIOUS THING,

administering, 193

with intent to cause miscarriage, 183

NUISANCE,

common or public, 140

contrasted with private nuisance, 146

when gives rise to civil action, 140

abatement, 141

to highways, &c., 141

offensive trades, &c., 141

houses as, 142

lotteries, 142

miscellaneous, 143

who is liable for, 143

NUMBER OF WITNESSES,

two in treason, 53, 412

two in perjury, 85, 412

O.

OATH,

nature of, in perjury, 82

of juror in felonies, 395

in misdemeanors, 395

of witness, 408

OATHS, false, 81: *v.* PERJURY.

OATHS, UNLAWFUL: *v.* UNLAWFUL.

OATHS, VOLUNTARY: *v.* VOLUNTARY.

OBLITERATING CROSSINGS ON CHEQUES, 263

OBSCENE BOOK, PRINT, &c., exposing to sale, 137

OBSTRUCTING LAWFUL ARREST, &c., 80

OBTAINING MONEY, &c.,

by means of forged instrument, 271

by false pretences: *v.* FALSE PRETENCES.

OFFENCE,

contrasted with crime, 7

of a public nature, 42

against the law of nations, 42

against the Government and Sovereign, 46

by members of the army and navy, 64

against religion, 72

against public justice, 77

OFFENCE—continued.

- compounding, 98
- against the public peace, 106
- against public trade, 120
- against public morals, health, and good order, 135
- of a private nature, or against individuals, 152
- why regarded as crimes, 152
- against the person, 153
- against the property, 198
- prevention of, 288 : *v.* PREVENTION.

OFFENDERS, photographing, 293 : *v.* HABITUAL.

OFFICE,

- bribery of those in, 88
- trafficking in public, 89

OFFICE, setting fire to, 273

OFFICER, PEACE,

- allowing escape, 77
- assaulted in execution of duty, 81, 195
- refusing to aid, 81
- killing those resisting, &c., in execution of duty, 156
- when guilty of murder or manslaughter, 156
- larceny by, 221
- embezzlement by, 234
- executing warrant, 320
- arrest by, 322

OFFICER, PUBLIC,

- misconduct of, 101
- malfeasance of, 102
- nonfeasance of, 102
- larceny by, 221
- embezzlement by, 234

ONUS PROBANDI, 424

OPINION EVIDENCE, 421

ORDER FOR MONEY, &c.,

- larceny of, 203
- forging, 263

ORDER OF MAGISTRATE, forging, 264

ORE, larceny of, 201

OUTLAWRY,

- in misdemeanors, 363
- in felonies, 363

OUTLAWRY—*continued.*

consequences of, 364

reversal of, 364

OVERT ACT,

in compassing, &c., death of Sovereign, 49

in treason generally, 53

OWNERSHIP OF STOLEN GOODS,

how described, 208

indictment, how laid, 337

of deceased, 338

of married woman, 338

of partner, 338

of company, 338

of county property, 338

in cases of bailment, 338

consequences of incorrectly laying, 338

OXFORD UNIVERSITY COURTS, 314

OYER AND TERMINER,

courts of, 301

commission of, 303

OYSTERS, stealing, dragging for, &c., 206

P.

PAINS AND PENALTIES, bill of, 295

PALMISTRY, 74

PANEL OF JURORS, 387

PAPER,

making, &c., in imitation of Exchequer bills, 270

purchasing, &c., such paper, 270

making, &c., in imitation of bank-notes, 270

PARDON,

not pleadable to an impeachment, 296

when may be pleaded, 329

at the discretion of the Sovereign, 473

when the Sovereign cannot pardon, 474

how given and construed, 474

conditional, 474 : *v.* LICENCE.

PARENT, killing by, in defence of child, 160

PARIS, DECLARATION OF, 43, n.

PARLIAMENT,

- high court of, 295
- in legislative capacity proceeds against offenders by bills of attainder, or of pains and penalties, 295
- in judicial capacity, by impeachment or indictment, 295
- proceedings on impeachment, 296
 - on indictment, 297 : *v. LORD HIGH STEWARD.*

PARLIAMENTARY ELECTION,

- false declarations as to, 87
- bribery, treating, undue influence, &c., at, 89

PAROL : *v. EVIDENCE.*

PARTIAL INSANITY, 22

PARTICULAR RIGHT AND WRONG THEORY IN INSANITY, 23

PARTNERS, goods of, ownership how laid, 338 : *v. JOINT OWNER.*

PARTY TO SUIT, contempt of court by, 104

PASSENGER : *v. RAILWAY.*

PAUPERIS, defence and prosecution *in forma*, 447

PAWNBROKER,

- receiving stolen property, 231
- compensation to, 456

PAYMASTER, forging name of, 264, n.

PEACE, commission of the, 304

PEACE, keeping the : *v. KEEPING.*

PEACE OFFICER : *v. OFFICER.*

PEACE : *v. PUBLIC PEACE.*

PEDIGREE, proof of, 430

PEERS,

- house of, impeachment before, 296
- indictment before, 297 : *v. LORD HIGH STEWARD.*

PEINE FORTE ET DURE, 371

PENAL SERVITUDE,

- being at large during term of, 79
 - where tried, 355
- as a punishment, 458
- place, &c., 458
- shortest term, 459

PENAL STATUTE, time limited for information or indictment on, 346 : *v. INFORMATION.*

PENETRATION, proof of, in rape will suffice, 180

PER INFORTUNIUM, homicide, 160

PEREMPTORY CHALLENGE : *v.* CHALLENGE

PERJURY,

- definition, 81
- punishments of, applied to other false oaths, 81
- false affirmations, 82
- nature of the oath, 82
- it must be taken falsely, wilfully, and absolutely, 83
- materiality of matter sworn, 83
- the oath need not be believed, &c., 84
- false verdict, &c., not perjury, 84
- sufficient to prove one assignment, 85
- under Vexatious Indictments Act, 85
- judge may direct prosecution, 85
- two witnesses must be called, 85
- punishment, 86
- subornation of, 86

PERPETUATION OF TESTIMONY, 438

PERSON, stealing from the, 225

PERSONATION, FALSE,

- punished at common law as a cheat, 246
- closely connected with forgery, 246
- of seamen, 246
- of soldiers, 246
- of owners of stock, &c., 247
- to obtain property generally, 247
- of bail, 248
- of voters, 248, n.

PETTY SESSIONAL COURT, 491

PETTY TREASON, now regarded simply as murder, 46, n.

PETTY JURY,

- contempt of court by, 104'
- who are liable to serve, 385
- who exempt, 386
- list prepared by sheriff, 386
- exemptions after service, 387
- fining for non-attendance, 388
- putting into the box, 388
- challenge (*q. v.*), 388
- tales* in case of insufficient number, 392
- conduct of, 393
- adjournment of trial, 393
- death, illness, &c., of, 393

PETTY JURY—continued.

special jury, 393

jury *de medietate lingue*, 314, 394

swearing the jury, 394

view of *locus in quo*, 450; *v.* EMBRACERY; VERDICT.**PETTY LARCENY**, distinguished from grand, 208**PETTY SESSIONS**: *v.* MAGISTRATE.**PHOTOGRAPHING OFFENDERS**, 293**PHYSICAL COMPULSION**, an exemption from criminal responsibility, 29**PIGEON**: *v.* BIRD.**PILES**, removing, 281**PIRACY**, 42

at common law, 42

when tried in England, 43

nation cannot be guilty of, 43

enemies cannot commit, 43

by statute, 44

punishment, 44

PLACE OF OFFENCE, when, must be specially stated in the indictment, 339**PLACE OF TRIAL**, 352

general rule, 352

exceptions, 352

if crime committed partly in one county, partly in another,

354

upon journey, 354

receivers, where tried, 355

accessories, 355

blow followed by death, 355

return from transportation, &c., 355

offences committed abroad, 356

in detached parts of counties, 356

PLANT,

larceny of, 202

destroying, 284

PLATES,

making, &c., to forge Exchequer bills, &c., 270

bank-notes, 270

PLEADING: *v.* PLEAS.**PLEAS**, 375

names and order of, 375

how many may be resorted to, 375

PLEAS—continued.

- to the jurisdiction, 376
- in abatement, 377
- special pleas in bar, 377
- judgment thereon, 377
- autrefois acquit*, 378
- autrefois convict*, 379
- autrefois attain*, 379
- pardon, 379
- general issue of not guilty, 380

PLEAS OF THE CROWN, origin of the term, 6

PLEDGE BY FACTOR, &c., OF GOODS INTRUSTED, 238

PLUNDERING WRECKS, 221

POACHING : v. GAME.

POCKET-PICKING, 225

POISON, administering, &c., 193

POLICE OFFICER : v. OFFICER.

POLICE SUPERVISION : v. SUPERVISION.

POLLS, challenge to the : *v. CHALLENGE.*

POND, malicious injury to, 282

POSSE COMITATUS, 109, 321

POSSESSION,

- having counterfeit coin in, 68
- skins, &c., of deer, 205
- stolen dogs, 206
- instruments, &c., for forging, 270 : *v. RECENT POSSESSION TAKING.*

POSSESSION, distinguished from property, 199

POST OFFICE,

- larceny, &c., in relation to, 226
- in case of *employés*, 226
- of any person, 226
- property laid in Postmaster-General, 227
- telegrams regarded as post letters, 227
- receiving, &c., post letters, &c., 230
- venue* in robbery of mails, &c., 353

POSTPONEMENT OF TRIAL, 369

POUNDEREACH, 80

POWER OF ATTORNEY,

- embezzlement by persons intrusted with, 237, 238

POWER OF ATTORNEY—continued.

forgery of, 262

forgery of attestation to, 263

PRACTICE (v. the various titles).*Arrest*, 317

by warrant, 317

without warrant, 322

upon hue and cry, 325

rewards for apprehension, 325

Proceedings before the magistrate, 327

examination, 327

bail, 330

Modes of prosecution, 335

upon previous finding, 335

presentment, 335

indictment, 336

counts, 341

joinder of defendants, 345

time limited for prosecution, 345

information, 345

coroner's inquisition, 348

Place of trial, 352*Grand jury*, 357

the charge, 357

examination before, 358

Vexatious Indictments Act, 359

Process, 361

bench warrant, 362

outlawry, 363

Certiorari, 366*Time of trial*, 369

arraignment, 370

standing mute, 371

confession, 373

Pleas, 375

to jurisdiction, 376

in abatement, 377

in bar, 377

autrefois acquit, 378

autrefois convict, 379

autrefois attain, 379

pardon, 379

the general issue, 380

PRACTICE—continued.

Demurrer, 382*Petty jury*, 385

summoning, 386

fining for non-attendance, 388

putting in box, 388

challenging, 388

tales, 392

conduct of, &c., 393

illness, death, 393

special, 393

Hearing, 395

swearing the jury, 395

giving the prisoner in charge, 396

address and examination by counsel, 396

summing-up, 400

questions by prisoner, a farce, 401

Witnesses, 403

grounds of incompetency, 403

tests of credibility, 409

character of, 411

number of, 412

evidence of accomplices, 412

attendance of, 413

expenses of, 415

Examination of witnesses, 417

witnesses out of court, 418

examination-in-chief, 419

leading questions, 419

evidence from own knowledge, 421

of experts, &c., 421

refreshing memory, 421

contents of documents, how proved, 421

witness proving hostile, 421

cross-examination, 422

re-examination, 423

questions through the judge, 423

objections to questions, 423

Evidence, 424

burden of proof, 424

what must be proved, 425

what may not be proved, 426

evidence of other offences, 426

PRACTICE—*continued.**Evidence—continued.*

- Evidence of other offences, when admitted, 427
- as to character, 428
- best evidence to be given, 429
- hearsay no evidence, 430
 - when admitted, 430
- depositions of ill or deceased persons, 431
- confession, 431
- circumstantial evidence, 433
- written evidence, 436
- handwriting, 439
- differences between rules of civil and criminal evidence, 440

Verdict, 442

- for crime not charged in indictment, 443
- acquittal or conviction, 444
- second indictment, 445
- proof of previous conviction, 445

Judgment, 447

- arrest of, 447

Incidents of trial, 449

- defence, &c., *in forma pauperis*, 449
- view of *locus*, 450
- adjournment of trial, 450
- withdrawal from prosecution, 450
- restitution of goods, 451

Punishment, 455

- death, 458
- penal servitude, 458
- imprisonment, 459
- fine, 460
- hard labour, 460
- whipping, 461
- solitary confinement, 462
- police supervision, 462
- recognizances and sureties, 463
- reformatory, 464
- industrial school, 464
- forfeiture of office, &c., 465
- costs, 466

Proceedings after trial, 467

- new trial, 467

PRACTICE—continued.*Proceedings after trial—continued.*

reversal of judgment by writ of error, 468

error under Supreme Court of Judicature Acts, 469

Court for Crown Cases Reserved, 471

Reprieve and pardon, 473

ticket of leave, 475

Execution, 475 : v. SUMMARY CONVICTIONS.

PREMUNIRE, 70

PREGNANCY of woman sentenced to death, 473

PRESENTMENT, 335

PRESUMPTIONS classified, 435

PRESUMPTIVE EVIDENCE, distinguished from direct, 433 : *v. CIRCUMSTANTIAL.*

PRETENCES : v. FALSE PRETENCES.

PREVENTION OF CRIME, 288

by giving security (*q. v.*), 288

general measures for, 293

PREVIOUS CONVICTION,

evidence of, on indictment for receiving, 229

when count may be added for, 344

how proved, 437, 445

when evidence of, may be given before subsequent conviction, 445, 446, *n.*

punishment for offences after, 456

in simple larceny, 456

in uttering coin, &c., 457

PRINCIPAL,

distinguished from accessory, 34

in the first degree, 34

in the second degree, 34

all are principals in treason, 39

as to misdemeanor, 39

PRISON : v. BREACH.**PRISONER,**

allowing to escape, 77

aiding to escape, 78

presence of, at trial, 372

statement by, 398

interrogation of, 404

PRIVATE NATURE, offences of a, 152

PRIVATEERING ABOLISHED, 43, n.

- PRIVILEGED COMMUNICATIONS,
 - exempting from libel, 114
 - between solicitor and client, 407
- PRIVY SEAL, forging, 262
- PROCESS, 361
 - warrant by magistrate, 361
 - bench warrant, 362
 - in misdemeanors, 362
 - in felonies, 363
 - outlawry, 363
 - on information, 364
- PROCLAMATION UNDER RIOT ACT, 108
- PROCURATION, making, accepting, bill, &c., by, for other person
 - without authority, 263, n.
- PROFANATION OF THE SABBATH, 75
- PROFANE SWEARING, 74
- PROMISSORY NOTE,
 - larceny of, 203
 - forging, 263
- PROPERTY, distinguished from possession, 199: *v.* GOODS; OWNERSHIP.
- PROSECUTIONS,
 - modes of, 335
 - director of public, 350
- PROVOCATION, reducing homicide to manslaughter, 169
- PUBLIC BUILDINGS, setting fire to, 274
- PUBLIC COMPANY: *v.* COMPANY.
- PUBLIC HEALTH, morals, &c., offences against, 135
- PUBLIC-HOUSE, offences by keeper of, *e.g.*, lodging thieves, 231
- PUBLIC JUSTICE, offences against, 77
- PUBLIC NATURE, offences of a, 42
- PUBLIC OFFICE, OFFICER: *v.* OFFICE; OFFICER.
- PUBLIC PEACE, offences against, 106
- PUBLIC PROSECUTIONS, director of, 350
- PUBLIC STORES, unlawful dealings with, 62
- PUBLIC TRADE, offences against, 120
- PUBLIC WORSHIP,
 - disturbing, &c., 74
 - riotous or indecent behaviour in, 74
- PUBLICATION OF LIBEL, 115
- PUNISHMENT,
 - general nature of, 1
 - the test whether a proceeding is civil or criminal, 4

PUNISHMENT—*continued.*

- minimum punishments abolished, 455
 - wide limits in some crimes, 455
 - for felonies, 455
 - after previous conviction, 456
 - for misdemeanor, 456
 - for larceny after previous conviction, 456
 - for uttering, &c., coin after previous conviction, 457
 - several terms, either concurrent or continuous, 457
 - punishments, enumerated, 457
 - death, 458
 - penal servitude, 458
 - imprisonment, 459
 - fine, 460
 - hard labour, 460
 - whipping, 461
 - solitary confinement, 462
 - police supervision, 462
 - recognizances and sureties, 463
 - reformatory, 464
 - industrial school, 464
 - forfeiture of property abolished, 465
 - of office, 465
 - property of felon taken care of, 466
 - costs by prisoner, 466
 - may be mitigated by Court of Summary Jurisdiction, 479
- PURCHASER OF STOLEN GOODS**, right of owner preferred to innocent, 451

Q.**QUAKER,**

- false affirmation by, 82
- affirmation by, 408

QUARREL, killing in sudden, 169**QUARTER SESSIONS FOR THE COUNTY**, 308

- time of holding, 308
- adjournment, 308
- who compose the court, 309
- jurisdiction, 309
- crimes not triable at, 309
- appeals against summary convictions, 311
- review of proceedings, 311
- Middlesex, 311

QUARTER SESSIONS FOR THE COUNTY—*continued.*

bail by, 333

appeal from, 470 : *v.* BOROUGH SESSIONS.

QUAY,

stealing from, 221

destroying, 281

QUEEN,

compassing the death of, 49

attempt to injure or alarm, 54 : *v.* SOVEREIGN.

QUEEN'S BENCH DIVISION, 299

Crown side and Plea side, 299

original jurisdiction, 299

transferred jurisdiction, 300

mode of trial, 301

may order trial at C. C. C., 301

supersedes other courts, 301

bail by, 332

QUEEN'S EVIDENCE, 374

QUI TAM, 346, n.

QUORUM, justices of the, 309, n.

R.

RABBITS : *v.* GAME.

RAILWAY,

offences endangering on, 194

setting fire to buildings, 273

malicious injury to train, 282

to telegraphs, 282

offences committed on, where tried, 354

RAPE, 179

who cannot be convicted of, 179

essentials of the crime, 179

credibility of testimony of the woman, 180

RAPUIT, must be used in indictment for rape, 339

REAL PROPERTY, at common law not the subject of larceny, 200

RECEIPT, forging, 263

RECEIVING STOLEN GOODS, 228

when a felony, when a misdemeanor, 228

if felony, offender tried as accessory, or as committer of a distinct felony, 228

evidence, 229

guilty knowledge, 229

evidence of previous conviction, 229, 294, 428

RECEIVING STOLEN GOODS—continued.

- post letters, &c., 230
- punishment, 230
- verdict of larceny or of receiving, 238
- any number of receivers may be tried for substantive felonies, 231
- pawnbrokers, 231
- count for larceny may be added, 231, 343
- where tried, 355
- evidence of having had possession, or of previous conviction, 427

RECENT POSSESSION, 232**RECOGNIZANCE,**

- nature of, 288
- for keeping the peace, 289
- for good behaviour, 289
- forfeiture or estreat, 289
- of witness to appear at trial, 328
- in case of those convicted of crimes under the Consolidated Acts, 463
- delivery to court, 334

RECOMMENDATION TO MERCY, 445**RECORDER**

- of London, at C. C. C., 307
- judge at borough sessions, 313

RECORD,

- courts of, 103, n.
- criminal dealings with, 101
- stealing, injuring, obliterating, &c., 204
- forging, &c., 263
- how proved, 436

RE-EXAMINATION, 423: v. EXAMINATION.**REFORMATORY, 464****REFRESHING THE MEMORY, 421****REGISTER,**

- of births, marriages, deaths, false declarations as to, 87
- forging, false entry, &c., 264
- of deeds, forging certificate relating to, 264

RELIGION,

- offences against, 72
- want of, does not now render incompetent to give evidence, 405

- RELIGIOUS IMPOSTORS, 74
- REMAND of accused by magistrate, 328
- REPLICATION TO PLEA, 376
- REPLY, right of, by counsel for prosecution, 397
- REPRIEVE, 473
- RESCUE, 80
 distinguished from escape, &c., 77
 of person committed for, or convicted of, murder, 80
 of offender sentenced to penal servitude, 80
- RESERVOIR,
 destroying works, 281
 damaging dams, &c., 282
- RES GESTÆ, hearsay admitted as evidence if part of, 431
- RESIDENCE, in burglary, 251
- RESPONSIBILITY, exemptions from criminal, 19
- RESTITUTION,
 in forcible entry and detainer, 119
 of goods under the Larceny Act, 451
- RETURNING FROM PENAL SERVITUDE: *v.* PENAL SERVITUDE.
- REVERSAL OF JUDGMENT, 466: *v.* WRIT OF ERROR.
- REWARD TO WITNESS, 325
- REWARD,
 taking, for helping to property stolen, &c., 99
 advertising for return of such property, 99
 for helping to recover stolen dog, 206
- RIGHT, claim of, no larceny where there is, 208, 216
- RING-DROPPING, 211
- RIOT, 107
 killing by officers justifiable, 156
- RIOT ACT, 108
- RIVER, nuisance to, 141
 destroying works, 281
- ROBBERY,
 on high seas is piracy, 43
 definition, 222, 259
 gist is the force or bodily fear, 222
 possession of the property must be obtained, 223
 taking must be from the person, or in the presence, 224
 against the will, 224
 punishment, 224
 assault with intent to rob, 225

ROBBERY—*continued.*

verdict of assault with, &c., on indictment for robbery, and
vice versa, 225

ROGUE AND VAGABOND, 145

ROUT, 107

S.

SABBATH, profanation of, 75

SACRILEGE, 256

SAILOR : *v.* NAVY ; SEAMAN.

SALE OF FOOD AND DRUGS ACT, 1875, 143

SANCTIONS,

attendant on civil injuries and on crimes, 1
 of the criminal law enumerated, 457

SAVINGS BANK, appropriation of money by officers, 241

SCIENTER : *v.* GUILTY KNOWLEDGE

SEA, sending unseaworthy ship to, 147

SEA-WALL, damaging, 281

SEAL,

forging great, 262
 forging privy, 262

SEAMAN,

forcing on shore, 195
 leaving behind, &c., 195
 false personation of, 246

SEARCH,

for game, 150
 for stolen property, 294

SEARCH WARRANT, 321

SECOND INDICTMENT, 445

SECONDARY EVIDENCE, 429

SECOND-HAND EVIDENCE : *v.* HEARSAY.

SECURITY,

giving, 288
 of what it consists, 288
 nature of the recognizance, 288
 forfeiture, 289
 by whom and of whom demanded, 289
 proceedings if granted by justices out of sessions, 290
 at sessions, 290

SECURITY—*continued.*for keeping the peace (*q. v.*), 291for good behaviour (*q. v.*), 291SECURITY, VALUABLE: *v.* VALUABLE SECURITY.

SE DEFENDENDO,

homicide, 158, 159

distinguished from manslaughter, 160, 170

SEDITION, 56

what constitutes seditious libels or words, 56

truth of, no defence, 57

SELF-DEFENCE: *v.* SE DEFENDENDO.

SELLING counterfeit coin at lower value, 67

SENDING THREATENING LETTERS: *v.* THREATENING.

SENDING unseaworthy ship to sea, 147

SENTENCE: *v.* JUDGMENT.

SEPARATION, judicial, after assault, 189

SEPARATISTS: *v.* QUAKERS.

SERVANT,

assault on, 196

authority of, to part with property or possession, 210

having oversight of goods, master still in possession, 212

taking master's corn, &c., 217

larceny by, 219

proof of employment as, in embezzlement, 234

SESSIONS: *v.* BOROUGH SESSIONS: QUARTER SESSIONS.SETTING FIRE: *v.* ARSON.

SETTLEMENT, ACT OF, two forms of treason violating provisions of, 52

SEVERANCE,

turning real into personal property, 200

must take place, to constitute asportation, 215

SHEEP STEALING, 207

killing, maiming, &c., 283

SHERIFF,

contempt of court by, 104

arrest by, 322

SHERIFF'S TOURN, 315, n.

SHIP,

forfeiture of, for offence against Foreign Enlistment Act, 60

sending to sea in unseaworthy state, 147

SHIP—continued.

- stealing from vessel in harbour or on river or canal, 221
 - in distress or wrecked, 221
- setting fire to, casting away, destroying, 275
 - attempt, 276
- setting fire to vessel of war, 276
 - to vessel in docks of port of London, 276
- damaging vessel by explosion, 280
 - otherwise, 280
- endangering, 280

SHIPBUILDING, ILLEGAL : *v.* FOREIGN ENLISTMENT ACT.SHIPWRECK : *v.* WRECK.

SHOOTING,

- at revenue vessels or officers, 121
- at any person with intent, &c., 191

SHOP,

- breaking into, 256
- setting fire to, 273

SIGN MANUAL, forging, 262

SIGNAL,

- tampering with, with intent to endanger vessel, 280,
- interfering with railway, 282

SILE,

- larceny of, in process of manufacture, 220
- injury to manufactures or machines, 279

SIMILITER, 381

SIMPLE LARCENY distinguished from compound, 198 : *v.* LARCENY.

SLANDER, indictable, 114

SLAVES, offences as to, 45

SLUICES, destroying or opening, 281

SMUGGLING, 120

- forfeitures and penalties, 120
- three or more armed for purpose of, 120
- shooting at revenue vessels or officers, 121
- more than five armed, or with prohibited goods, 121
- assaulting officers, 121
- making signals to smuggling vessels, 121
- search for smuggled goods, 122
- time limited for prosecution, 345

SOCIETIES, UNLAWFUL : *v.* UNLAWFUL.SODOMY : *v.* UNNATURAL CRIME.

SOLDIER, false personation of, 246: *v.* ARMY.

SOLICITOR,

embezzlement by, 237

when incompetent to give evidence against client, 407

SOLITARY CONFINEMENT, 462

SOVEREIGN,

incapable of committing crime, 31

offences against, 46

compassing, or imagining the death of, 49

levying war against, 50

compassing, &c., death, destruction, harm, &c., 52

compassing to depose, &c., 55

various contempts, and high misdemeanors against, 70

"SPEAKING WITH THE PROSECUTOR," 100

SPECIAL COMMISSION, 304

SPECIAL JURY, 393

SPECIAL PLEA: *v.* PLEA.

SPRING-GUN, setting, 150

STABBING: *v.* WOUNDING.

STABLE, setting fire to, 273

STACK, setting fire to, 274

STAMPS, forging Inland Revenue, 264

STANDING MUTE: *v.* MUTE.

STARVING, homicide by, 165

STATEMENT OF INDICTMENT, 337

as to name, 337

ownership, 337

time, 338

place, 339

facts, &c., 339

STATION, setting fire to, 273

STATUES, destroying, &c., 285

STATUTE,

crimes by, 5

when makes an act an indictable crime, 7, 336

how proved, 436

STEALING, CHILDREN, 185: *v.* LARCENY.

STEWARD, LORD HIGH: *v.* LORD HIGH STEWARD.

STOCK,

false personation of owners of, 247

STOCK—continued.

forging transfer of, 262

forging stock certificates for payment of interest of national debt, 264

STOLEN PROPERTY, RECEIVING : v. RECEIVING ; SEARCH.
restitution of : v. **RESTITUTION.**

STORES : v. PUBLIC STORES.

STRANGLE, attempt to, with intent, &c., 192

STRAW, setting fire to, 274

SUBORNATION OF PERJURY, 86

SUBPCENA, 413

consequence of not obeying, 413

SUBPCENA DUCES TECUM, 413

SUFFOCATE, attempt to, with intent, &c., 192

SUICIDE, 161

advising to commit, 162

consequences, 162

attempt to commit, 163

SUING in name of fictitious plaintiff, 97

SUMMARY CONVICTIONS, 478

jurisdiction, &c., of magistrates, 478

is local, 480

how many required, 480

cases beyond jurisdiction, 480

power of mitigating punishment, 479

effect of court's judgment, 480

right to trial by jury, 481

classification of offences dealt with summarily, 481

offences by children, 482

young persons, 483

adults, 493

common assaults and batteries, 189, 485

larcenies not indictable, 486

small wilful injuries, 487

offences relating to game, 488

proceedings, 488

the information, 488

summons, 489

warrant, 489

examination in absence of accused, 490

the hearing, 490

"open court," 491

SUMMARY CONVICTIONS—continued.

- "petty sessional court," 491
- one party not appearing, 491
- adjournment, 492
- proceedings at hearing, 492
- conviction or dismissal, 492
- judgment, 493
- enforcing fines, 493
- distress, 493
- costs, 495
- appeal, 495
 - to quarter sessions, 311, 495
 - under the Summary Jurisdiction Act, 1879, 496
 - case stated to superior court, 498
 - on point of law, 498
- irregular commitment, 499
- removal to Queen's Bench Division by *certiorari*, 491
- proceedings against magistrates, 499
- summary jurisdiction depends entirely on statute, 499

SUMMING-UP OF THE JUDGE, 400**SUMMONS,**

- forgery of, 264
- issue of, 318
- contents of, 320
- form of, 320, n.
- to person charged with summary offence, 489
- to secure attendance of witness, 490

SUNDAY : v. SABBATH.**SUPERVISION OF POLICE, 294, 462****SUPPLICAVIT, writ of, 289****SUPREME COURT OF JUDICATURE ACT,**

- judges at assizes under, 304, n.
- appeal under, 470

SURETIES : v. BAIL ; RECOGNIZANCE**SURREY, commission, &c., for, 302]****SUSPICION,**

- arrest by constable on, 322
- by private person, 324

"SWEARING THE PEACE," 291**SWEARING, profane, 74**

T.

TAKING,

- wilfully wrongful, 208
- actual, 209
- constructive, 209
- what amounts to, 215
- lucri causâ*, 217
- in robbery, 224 : *v.* LARCENY.

TALES DE CIRCUMSTANTIBUS, 392

TELEGRAPH,

- stealing, &c., messages, 227
- disclosing or intercepting messages, 227
- injury to, 282

TENANT,

- larceny by, 219
- demolishing buildings, 279

TENANT IN COMMON, larceny by, 214

THEFT, proposed definition of, 198, 259 : *v.* LARCENY.

THEFT BOTE, 99

THREATENING LETTER,

- sending, to burn, kill, &c., 110
- to murder, 110
- with intent to extort money, &c., 110
- accusing of crime, in order to extort, 111

THREATS,

- in order to extort money, 110
- in order to procure execution of deed, &c., 111
- to publish libel in order to extort, 118
- stealing in dwelling-house with, 257

TICKET OF LEAVE : *v.* LICENCE.

TIME,

- when of essence of crime, 338
- limited for prosecution in certain cases, 345
- of trial, 369

TITLE-DEEDS, at common law not subjects of larceny, 202

TOOLS,

- making coining, 69
- conveying out of Mint, 69
- search for, and seizure of, 69

TORTS CONTRASTED WITH CRIMES, 2

TRADE,

- offences against public, 120
- unlawful interference with, by combinations, &c., 126
- trade union, 127
- acts criminally punishable, 127
- proceedings by indictment or summary conviction at option of offender, 128
- assault to obstruct sale of grain, &c., 129

TRADES, offensive or dangerous are nuisances, 141

TRADE-MARKS,

- counterfeiting and falsely applying, 125, 265
- selling goods with forged, 126

TRADE UNION, not to render liable to prosecution for conspiracy, merely because in restraint of trade, 127 : *v. TRADE*.

TRAINING, illegal : *v. DRILLING*.

TRANSFER OF LAND ACT, 1875, offences against, 265, 271

TRANSPORTATION : *v. PENAL SERVITUDE*.

TREASON,

- why termed "high," 46, n.
- popular conception of, 46
- classification of acts of, 47
- history of the law of, 47
- the statute 25 Edw. 3, 47
- gist of the offence altered, 48
- compassing, &c., death of Sovereign, &c., 49
- violating King's wife, &c., 49
- levying war, 50
- adhering to Sovereign's enemies, 50
- slaying the Chancellor, &c., 51
- counterfeiting the Great Seal and coinage offences no longer treason, 51
- additions to the list of acts which are, 51
- time limited for prosecution, 52, 346
- prisoner may have copy of indictment and list of witnesses, 52
- the overt act, 53
- prisoner's defence, 53
- punishment, 53
- evidence of other acts may be given, 427

TREASON, MISPRISION OF : *v. MISPRISION*.

TREASON-FELONY, 55

TREASURE TROVE, concealment of, 70

TREATING AT ELECTIONS, 91]

TREES,

- larceny of, 201
- setting fire to, 274
- damaging, &c., 284

TRESPASS, larceny distinguished from, 216

TRIAL,

- offences interfering with free administration of justice at, 95
- place of, 352
- time of, 369
- modes of, 384 : *v.* PRACTICE.

TRIALS, in case of challenge of jurors, 391

TRUSTEE, embezzlement by, 239

TRUTH,

- of seditious libel, no extenuation, 57
- of defamatory libel, 112

TURNPIKE, destroying gates, bars, &c., 281

U.

UNDUE INFLUENCE AT ELECTIONS, 91

UNIVERSITY COURTS, 314

UNLAWFUL ASSEMBLIES, 106

UNLAWFUL COMBINATION : *v.* TRADE ; UNLAWFUL SOCIETIES.

UNLAWFUL OATHS, 57

- voluntary oaths, 86

UNLAWFUL SOCIETIES, 58

UNNATURAL OFFENCE, 182

- attempt, 182

- assault with intent, 182

UNSEAWORTHY SHIPS, sending to sea, 147

UTTERING COUNTERFEIT COIN, 68

UTTERING,

- in forgery, 268
- the guilty knowledge, 269

V.

VAGRANCY, 144

VALUABLE SECURITY,

- stealing, destroying, obliterating, &c., 202
- the term defined, 202
- inducing person by fraud to execute, 246

- VALUE OF THING STOLEN, 207
 VARIANCE BETWEEN INDICTMENT AND EVIDENCE, 340
 VEGETABLE : *v.* PLANT.
 VEHICLE : *v.* DRIVING.
 VENIRE FACIAS AD RESPONDENDUM, 362
 VENUE, 339 : *v.* PLACE.
 VERDICT, 442
 how arrived at and given, 442
 general, partial, or special, 442
 in case of co-defendants, 443
 of attempt on indictment for complete crime, 443
 for crime other than that charged, 443
 objections to, 444
 of acquittal, what it implies, 444
 of guilty, 445
 after previous conviction, 445
 VESSEL : *v.* SHIP.
 VEXATIOUS INDICTMENTS ACT, 359
 VIADUCTS, destroying, &c., 281
 VICE-CHANCELLOR'S COURT AT OXFORD AND CAMBRIDGE, 314
 VIEW OF FRANK-PLEDGE, 315, n.
 VIEW OF LOCUS IN QUO BY JURY, 450
 VIOLATION OF KING'S WIFE, &c., 49
 VIOLENCE, in robbery, 223
 VOLUNTARY OATHS, 86

W.

- WALL,
 destroying, 282
 damaging sea or river, 281
 WAR, levying, against the Sovereign, 50
 WAR, PRISONER OF, aiding to escape, 78
 WAREHOUSE,
 breaking into, 256
 setting fire to, 273
 WARRANT,
 larceny of, 203
 forging, 263, 264
 definition, 317

WARRANT—continued.

- by whom granted, 317
- when issued, 318
- if indictment has been found, 318, 361
- if accused is in custody, 319
- construction of, 319
- form of, 320, n.
- backing, 320
- executing, 320
- general warrants, illegal, 321
- search warrants, 321
- bench warrant, 362
- in case of person charged with summary offence, 489
- to compel attendance of witness, 490

WATER, DEPRIVING OF, by wilfully breaking contract of service,
128

WAY: v. HIGHWAY.

WEIGHTS AND MEASURES, false, 248, 249, n., 315

WHARF,

- stealing from, 221
- destroying, 281

WHIPPING, 455

WIFE,

- when not criminally responsible, 29
- as accessory after the fact, 38
- cannot steal property of husband, 214
- goods of, ownership how laid, 338
- cannot be witness against her husband, except in a few cases, 405

WILFUL INJURY: v. MALICIOUS INJURY.

WILL,

- stealing, destroying, &c., 203
- forging, 263

WILL,

- an essential of a crime, 12
- contrasted with intention, 12
- absence of, exempts from criminal responsibility, 19

WINTER ASSIZES, 302

WITCHCRAFT, 74

WITHDRAWAL FROM PROSECUTION, 450

WITNESS,

- offences with regard to, 96, 414

WITNESS—continued.

- contempt of court by, 104
- before magistrates, 327
- binding over to appear at trial, 328
- examination by grand jury, 358
- grounds of incompetency fewer now than formerly, 403
- forms of incompetency, 403
- incompetency of accused, 404
 - of accused's consort, 405
 - on account of insanity, 406
 - of infancy, 407
 - of relation of legal adviser, 407
 - of want of religious belief, 408
- objection to competency, when made, 409
- credibility of, 409
- knowledge of, 409
- disinterestedness of, 410
- veracity of, 410
- general character of, 411
- what questions witness may refuse to answer, 411, 433
- number of, 412
- accomplices as, 412
- attendance of, how secured, 413
- production of documents by, 413
- consequences of failure to appear, 414
- attendance of witness, who is in custody, 414
- privilege from arrest, 414
- expenses of, 415
- ordering out of court, 418 : *v. EXAMINATION.*
- when a defendant or his consort may be witness, 440, n.

WOMEN : *v. GIRLS.***WOOD, setting fire to, 274 : *v. FIXTURES.*****WOOLLEN,**

- larceny of, goods in process of manufacture, 220
- injury to manufactures or machinery, 279

WORDS, technical, when to be used in indictment, 339**WORKMEN : *v. TRADE.*****WORKS OF ART, destroying, &c., 285****WORSHIP : *v. PUBLIC WORSHIP.*****WOUNDING, 191**

- animals, 283

WRECK,

- assault upon those engaged in preservation of, 195

WRECK—continued.

- impeding escape from, 195
- stealing from, 221
- destroying, 281

WRIT OF ERROR, 468

- when it lies, 469
- how obtained, 469
- judgment affirmed or reversed, 469

WRITING,

- how proved, 421
- best evidence as to, 429
- rules as to evidence of, 436: *u. EVIDENCE.*

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INDEX OF SUBJECTS.

	PAGE		PAGE
ADMINISTRATION ACTIONS—		COMMERCIAL AGENCY—	
Walker and Elgood	18	Campbell	9
ADMINISTRATORS—		COMMON LAW—	
Walker	6	Indermaur	24
ADMIRALTY LAW—		COMMON PLEAS DIVISION, Practice of—	
Jones	14	Griffith and Loveland	6
Kay	17	COMPANIES LAW—	
Smith	23	Brice	16
ARTIZANS AND LABOURERS' DWELLINGS—Lloyd	13	Buckley	17
ASSAULTS—		Reilly's Reports	29
See MAGISTERIAL LAW.		Smith	39
BALLOT ACT—		Watts	47
Bushby	33	See MAGISTERIAL LAW.	
BANKRUPTCY—		COMPENSATION—	
Baldwin	15	Browne	19
Hazlitt	29	Lloyd	13
Ringwood	15, 29	COMPULSORY PURCHASE—	
BAR EXAMINATION JOURNAL	39	Browne	19
BIBLIOGRAPHY	40	CONSTABLES—	
BILLS OF LADING—		See POLICE GUIDE.	
Campbell	9	CONSTITUTIONAL LAW AND HISTORY—	
Kay	17	Forsyth	14
BILLS OF SALE—		Taswell-Langmead	21
Baldwin	15	Thomas	28
Indermaur	28	CONTRACTS—	
Ringwood	15, 26	Kay	17
BIRTHS AND DEATHS REGISTRATION—		CONVEYANCING—	
Flaxman	43	Copinger, Title Deeds	45
BUILDING LEASES AND CONTRACTS—		Copinger, Precedents in	40
Emden	8	Deane, Principles of	23
CAPACITY—		Williams	7
See PRIVATE INTERNATIONAL LAW.		COPYRIGHT—	
CAPITAL PUNISHMENT—		Copinger	45
Copinger	42	CORPORATIONS—	
CARRIERS—		Brice	16
See RAILWAY LAW.		Browne	19
„ SHIPMASTERS.		COSTS, Crown Office—	
CHANCERY DIVISION, Practice of—		Short	41
Brown's Edition of Snell	22	COVENANTS FOR TITLE—	
Griffith and Loveland	6	Copinger	45
Indermaur	25	CREW OF A SHIP—	
Williams	7	Kay	17
And see EQUITY.		CRIMINAL LAW—	
CHARITABLE TRUSTS—		Copinger	42
Cooke	10	Harris	27
Whiteford	20	See MAGISTERIAL LAW.	
CHURCH AND CLERGY—		CROWN LAW—	
Brice	9	Forsyth	14
CIVIL LAW—See ROMAN LAW.		Hall	30
CODES—Argles	32	Kelyrg	35
COLLISIONS AT SEA—Kay	17	Taswell-Langmead	21
COLONIAL LAW—		Thomas	28
Canada	18	CROWN PRACTICE—	
Cape Colony	38	Corner	10
Forsyth	14	CUSTOM AND USAGE—	
New Zealand Statutes	18	Browne	19
Tarring	41	Mayne	38
		CUSTOMS—	
		See MAGISTERIAL LAW.	

INDEX OF SUBJECTS—*continued.*

	PAGE		PAGE
DAMAGES—		GAME LAWS—Locke	32
Mayne	31	<i>See</i> MAGISTERIAL LAW.	
DICTIONARIES—		HACKNEY CARRIAGES—	
Brown	26	<i>See</i> MAGISTERIAL LAW.	
DIGESTS—		HINDU LAW—	
Law Magazine Quarterly Digest .	37	Coghlan	28
Menzies' Digest of Cape Reports.	38	Cunningham	38 and 42
DISCOVERY—		Mayne	38
Griffith's Judicature Acts . . .	6	Michell	44
Peile	7	HISTORY—	
DISTRICT REGISTRIES—		Braithwaite	18
Simmons	6	Taswell-Langmead	21
DIVORCE—Harrison	23	HYPOTHECATION—	
DOMICIL—		Kay	17
<i>See</i> PRIVATE INTERNATIONAL		INDEX TO PRECEDENTS—	
LAW.		Copingier	40
DUTCH LAW	38	INFANTS—	
ECCLESIASTICAL LAW—		Simpson	43
Brice	9	INJUNCTIONS—	
Smith	23	Joyce	11
EDUCATION ACTS—		INSTITUTE OF THE LAW—	
<i>See</i> MAGISTERIAL LAW.		Brown's Law Dictionary	26
ELECTION LAW and PETITIONS—		INTERNATIONAL LAW—	
Bushby	33	Clarke	44
Hardcastle	33	Foote	36
O'Malley and Hardcastle	33	Law Magazine	37
Seager	47	INTERROGATORIES—	
EQUITY—		Griffith and Loveland's Edition of	
Choyce Cases	35	the Judicature Acts	6
Pemberton	32	Peile	7
Snell	22	INTOXICATING LIQUORS—	
Williams	7	<i>See</i> MAGISTERIAL LAW.	
EVIDENCE—		JOINT STOCK COMPANIES—	
<i>See</i> USAGES AND CUSTOMS.		<i>See</i> COMPANIES.	
EXAMINATION OF STUDENTS—		JUDICATURE ACTS—	
Bar Examination Journal	39	Cunningham and Mattinson . . .	7
Indermaur	24 and 25	Griffith	6
EXCHEQUER DIVISION, Practice of—		Indermaur	25
Griffith and Loveland	6	Kelke	6
EXECUTORS—		JURISPRUDENCE—Forsyth	14
Walker	6	JUSTINIAN'S INSTITUTES—	
EXTRADITION—		Campbell	47
Clarke	44	Harris	20
<i>See</i> MAGISTERIAL LAW.		LANDS CLAUSES CONSOLIDA-	
FACTORIES—		TION ACT—	
<i>See</i> MAGISTERIAL LAW.		Lloyd	13
FISHERIES—		LAND, IMPROVEMENT OF, by	
<i>See</i> MAGISTERIAL LAW.		Buildings—	
FIXTURES—		Emden	8
Brown	33	LATIN MAXIMS	28
FOREIGN LAW—		LAW DICTIONARY—	
Argles	32	Brown	26
Dutch Law	38	LAW MAGAZINE and REVIEW .	37
Foote	36	LEADING CASES—	
Harris	47	Common Law	25
FORGERY—		Constitutional Law	28
<i>See</i> MAGISTERIAL LAW.		Equity and Conveyancing . . .	25
FRAUDULENT CONVEYANCES—		Hindu Law	28
May	29	LEADING STATUTES—	
GAUJUS INSTITUTES—		Thomas	28
Harris	20		

INDEX OF SUBJECTS—*continued.*

	PAGE		PAGE
LEASES—		PARLIAMENTARY PRACTICE—	
Copingar	45	Browne	19
LEGACY AND SUCCESSION—		PARTITION—	
Hanson	10	Walker	43
LEGITIMACY AND MARRIAGE—		PASSENGERS—	
<i>See</i> PRIVATE INTERNATIONAL LAW.		<i>See</i> MAGISTERIAL LAW.	
LICENSES—		„ RAILWAY LAW.	
<i>See</i> MAGISTERIAL LAW.		PASSENGERS AT SEA—	
LIFE ASSURANCE—		Kay	17
Buckley	17	PATENTS—	
Reilly	29	Daniel	42
LIMITATION OF ACTIONS—		Higgins	12
Banning	42	PAWNBROKERS—	
LIQUIDATION with CREDITORS—		<i>See</i> MAGISTERIAL LAW.	
Baldwin	15	PERSONATION AND IDENTITY—	
Ringwood	15	Moriarty	14
And <i>see</i> BANKRUPTCY.		PETITIONS IN CHANCERY AND LUNACY—	
LLOYD'S BONDS	14	Williams	7
LUNACY—		PILOTS—	
Williams	7	Kay	17
MAGISTERIAL LAW—		POLICE GUIDE—	
Greenwood and Martin	46	Greenwood and Martin	46
MALICIOUS INJURIES—		POLLUTION OF RIVERS—	
<i>See</i> MAGISTERIAL LAW.		Higgins	30
MARRIAGE and LEGITIMACY—		PRACTICE BOOKS—	
Foote	36	Bankruptcy	15
MARRIED WOMEN'S PROPERTY ACTS—		Companies Law	29 and 39
Bromfield's Edition of Griffith	40	Compensation	13
MASTER AND SERVANT—		Compulsory Purchase	19
<i>See</i> SHIPMASTERS & SEAMEN.		Conveyancing	45
MASTERS AND SERVANTS—		Damages	31
<i>See</i> MAGISTERIAL LAW.		Ecclesiastical Law	9
MERCANTILE LAW	32	Election Petitions	33
Campbell	9	Equity	7, 22 and 32
<i>See</i> SHIPMASTERS and SEAMEN.		High Court of Justice	6 and 25
„ STOPPAGE IN TRANSITU.		Injunctions	11
MERCHANDISE MARKS—		Judicature Acts	6 and 25
Daniel	42	Magisterial	46
MINES—		Pleading, Precedents of	7
Harris	47	Privy Council	44
<i>See</i> MAGISTERIAL LAW.		Railways	14
MORTMAIN—		Railway Commission	19
<i>See</i> CHARITABLE TRUSTS.		Rating	19
NATIONALITY—		Supreme Court of Judicature	6 and 25
<i>See</i> PRIVATE INTERNATIONAL LAW.		PRECEDENTS OF PLEADING—	
NEGLIGENCE—		Cunningham and Mattinson	7
Campbell	40	Mattinson and Macaskie	7
NEW ZEALAND—		PRIMOGENITURE—	
Jurist Journal and Reports	18	Lloyd	13
Statutes	18	PRINCIPLES—	
OBLIGATIONS—		Brice (Corporations)	16
Brown's Savigny	20	Browne (Rating)	19
PARLIAMENT—		Deane (Conveyancing)	23
Taswell-Langmead	21	Harris (Criminal Law)	27
Thomas	28	Houston (Mercantile)	32
		Indermaur (Common Law)	24
		Joyce (Injunctions)	11
		Ringwood (Bankruptcy)	15
		Snell (Equity)	22

INDEX OF SUBJECTS—continued.

	PAGE		PAGE
PRIORITY—		SALVAGE—	
Robinson	32	Jones	14
PRIVATE INTERNATIONAL LAW—		Kay	17
Foot	36	SANITARY ACTS—	
PRIVY COUNCIL—		See MAGISTERIAL LAW.	
Michell	44	SEA SHORE—	
PROBATE—		Hall	30
Hanson	10	SHIPMASTERS AND SEAMEN—	
Harrison	23	Kay	17
PROMOTERS—		SOCIETIES—	
Watts	47	See CORPORATIONS.	
PUBLIC WORSHIP—		STAGE CARRIAGES—	
Brice	9	See MAGISTERIAL LAW.	
QUARTER SESSIONS—		STAMP DUTIES—	
Smith (F. J.)	6	Copinger	40 and 45
QUEEN'S BENCH DIVISION, Practice		STATUTE OF LIMITATIONS—	
of—		Banning	42
Griffith and Loveland	6	STATUTES—	
Indermaur	25	Hardcastle	9
QUESTIONS FOR STUDENTS—		New Zealand	18
Aldred	21	Thomas	28
Bar Examination Journal	39	STOPPAGE IN TRANSITU—	
Indermaur	25	Campbell	9
Waite	22	Houston	32
RAILWAYS—		Kay	17
Browne	19	STUDENTS' BOOKS	20—28, 39, 47
Godefroi and Shortt	14	SUCCESSION DUTIES—	
See MAGISTERIAL LAW.		Hanson	10
RATING—		SUCCESSION LAWS—	
Browne	19	Lloyd	13
REAL PROPERTY—		SUPREME COURT OF JUDICA-	
Deane	23	TURE, Practice of—	
Tarring	26	Cunningham and Mattinson	7
REGISTRATION—		Griffith and Loveland	6
Flaxman (Births and Deaths)	43	Indermaur	25
Seager (Parliamentary)	47	TELEGRAPHS—	
REMINISCENCE—		See MAGISTERIAL LAW.	
Braithwaite	18	TITLE DEEDS—	
REPORTS—		Copinger	45
Bellewe	34	TOWNS IMPROVEMENTS—	
Brooke	35	See MAGISTERIAL LAW.	
Choyce Cases	35	TRADE MARKS—	
Cooke	35	Daniel	42
Cunningham	34	TREASON—	
Election Petitions	33	Kelyng	35
Finlason	32	Taswell-Langmead	21
Gibbs, Seymour Will Case	10	TRIALS—Queen v. Gurney	32
Kelyng, John	35	ULTRA VIRES—	
Kelynge, William	35	Brice	16
Reilly	29	USAGES AND CUSTOMS—	
Shower (Cases in Parliament)	34	Browne	19
ROMAN DUTCH LAW—		Mayne	38
Van Leeuwen	38	VOLUNTARY CONVEYANCES—	
ROMAN LAW—		May	29
Brown's Analysis of Savigny	20	WATER COURSES—	
Campbell	47	Higgins	30
Harris	20	WILLS, CONSTRUCTION OF—	
		Gibbs, Report of Wallace v.	
		Attorney-General	10

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Section 2.—Privileges and powers of colonial Legislative Assemblies.

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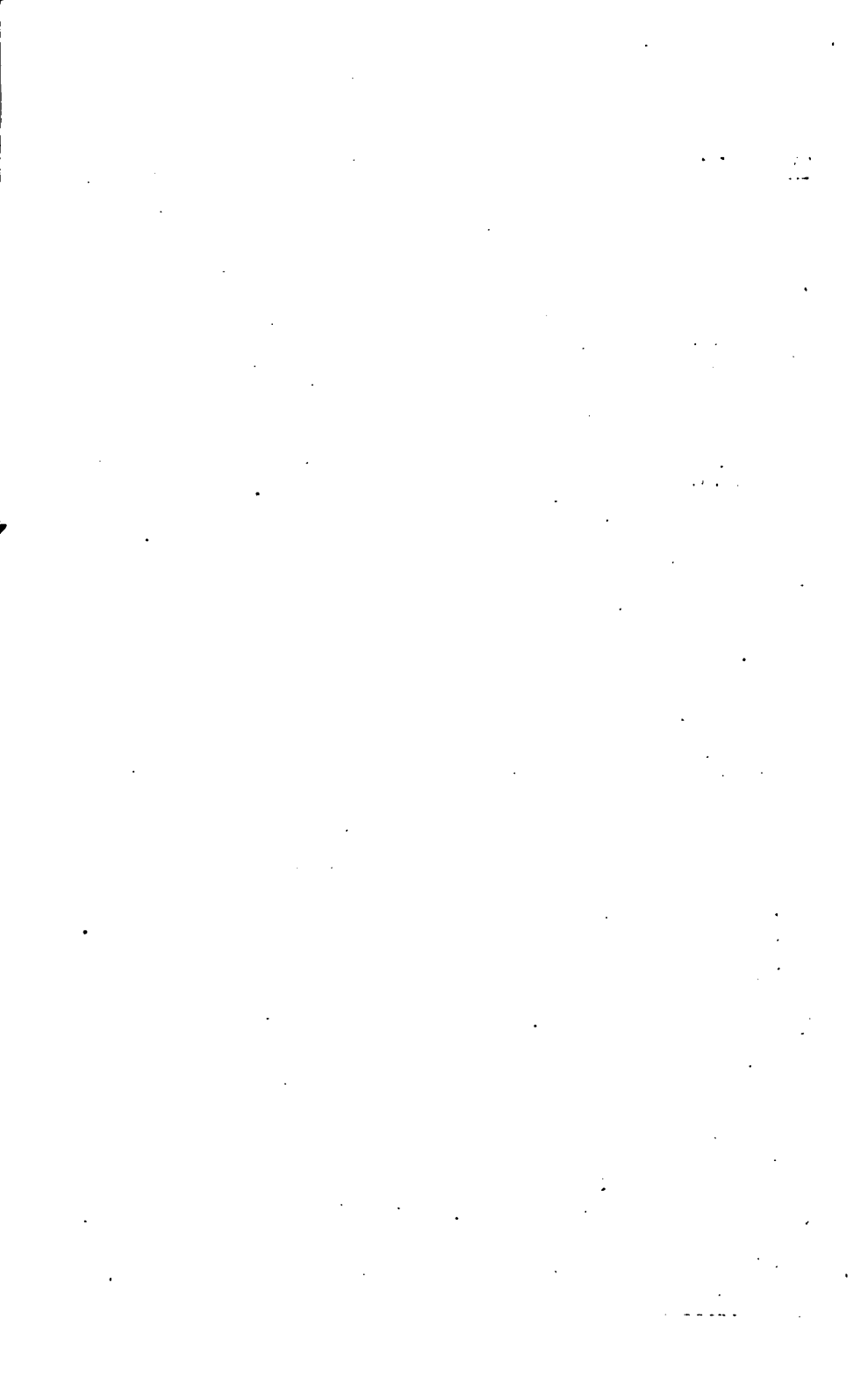
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INDEX

TO THE NAMES OF AUTHORS AND EDITORS OF WORKS ENUMERATED
IN THIS CATALOGUE.

- ALDRED (P. F.), page 21.
 ARGLES (N.), 32.
 BALDWIN (E. T.), 15.
 BANNING (H. T.), 42.
 BARTON (G. B.), 18.
 BELLEWE (R.), 34.
 BRAITHWAITE (T. W.), 18.
 BRICE (SEWARD), 9, 16.
 BROMFIELD (S. W.), 40.
 BROOKE (SIR R.), 35.
 BROWN (ARCHIBALD), 20, 22, 26, 33.
 BROWNE (J. H. BALFOUR), 19.
 BUCHANAN, (J.), 38.
 BUCKLEY (H. B.), 17.
 BUCKNILL (T. T.), 34, 35.
 BUSHBY (H. J.), 33.
 CAMPBELL (GORDON), 47.
 CAMPBELL (ROBERT), 9, 40.
 CHALMERS (M. D.), 10.
 CLARKE (EDWARD), 44.
 COGHIAN (W. M.), 28.
 COOKE (SIR G.), 35.
 COOKE (HUGH), 10.
 COPINGER (W. A.), 40, 42, 45.
 CORNER (R. J.), 10.
 CUNNINGHAM (H. S.), 38, 42.
 CUNNINGHAM (JOHN), 7.
 CUNNINGHAM (T.), 34.
 DANIEL (E. M.), 42.
 DEANE (H. C.), 23.
 DE WAL (J.), 38.
 DOUTRE (J.), 18.
 EDWARDS (W. D.), 39.
 ELGOOD (E. J.), 18.
 EMDEN (A.), 8.
 EVANS (G.), 32.
 FINLASON (W. F.), 32.
 FLAXMAN (A. J.), 43.
 FOOTE (J. ALDERSON), 36.
 FORSYTH (W.), 14.
 GIBBS (F. W.), 10.
 GODEFROI (H.), 14.
 GREENWOOD (H. C.), 46.
 GRIFFITH (J. R.), 40.
 GRIFFITH (W. DOWNES), 6.
 GROTIUS (HUGO), 38.
 HALL (R. G.), 30.
 HANSON (A.), 10.
 HARDCASTLE (H.), 9, 33.
 HARRIS (SEYMOUR F.), 20, 27.
 HARRIS (W. A.), 47.
 HARRISON (J. C.), 23.
 HARWOOD (R. G.), 10.
 HAZLITT (W.), 29.
 HIGGINS (C.), 12, 30.
 HOUSTON (J.), 32.
 INDERMAUR (JOHN), page 24, 25, 28.
 JONES (E.), 14.
 JOYCE (W.), 11.
 KAY (JOSEPH), 17.
 KELKE (W. H.), 6.
 KELYNG (SIR J.), 35.
 KELYNGE (W.), 35.
 KOTZÉ (J. G.), 38.
 LLOYD (EYRE), 13.
 LOCKE (J.), 32.
 LORENZ (C. A.), 38.
 LOVELAND (R. L.), 6, 30, 34, 35.
 MAASDORP (A. F. S.), 38.
 MACASKIE (S. C.), 7.
 MARCH (JOHN), 35.
 MARSH (THOMAS), 21.
 MARTIN (TEMPLE C.), 46.
 MATTINSON (M. W.), 7.
 MAY (H. W.), 29.
 MAYNE (JOHN D.), 31, 38.
 MENZIES (W.), 38.
 MICHELL (E. B.), 44.
 MORIARTY, 14.
 O'MALLEY (E. L.), 33.
 PEILE (C. J.), 7.
 PEMBERTON (L. L.), 32.
 REILLY (F. S.), 29.
 RINGWOOD (R.), 15, 29.
 ROBINSON (W. G.), 32.
 SAVIGNY (F. C. VON), 20.
 SEAGER (J. R.), 47.
 SHORT (F. H.), 10, 41.
 SHORTT (JOHN), 14.
 SHOWER (SIR B.), 34.
 SIMMONS (F.), 6.
 SIMPSON (A. H.), 43.
 SMITH (EUSTACE), 23, 39.
 SMITH (F. J.), 6.
 SMITH (LUMLEY), 31.
 SNELL (E. H. T.), 22.
 TARRANT (H. J.), 14.
 TARRING (C. J.), 26, 41.
 TASWELL-LANGMEAD, 21.
 THOMAS (ERNEST C.), 28.
 TYSEN (A. D.), 39.
 VAN DER KEESEL (D. G.), 38.
 VAN LEEUWEN, 38.
 WAITE (W. T.), 22.
 WALKER (W. G.), 6, 18, 43.
 WATTS (C. N.), 47.
 WHITEFORD (F. M.), 20.
 WILLIAMS (S. E.), 7.



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